June 12, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I am submitting this letter of recommendation to convey my enthusiastic and unqualified recommendation of Graham Smith as a clerk in your chambers.

Graham is a second-year student at the USC Gould School of Law. I got to know Graham a bit the summer before he matriculated at Gould. Dean Andrew Guzman and I co-taught a summer reading course on "Law and Leadership" to a group of sixteen incoming USC Gould law students. Graham was part of that group. In that setting, we discussed the joy and challenges of leadership, looking at specific situations and probing students as to how they would approach the problems that we posed. Our goal was not to have them come to any specific decision, but rather to gain appreciation of the various factors that a leader has to consider. We encouraged the students to reflect on their own experiences working for others, and attempt to start to build up their own mental inventory of what makes an effective leader and, equally important, what makes someone an ineffective leader. Graham was an active and engaged participant in these discussions. There was no credit for taking the course, and the course was on Zoom, and it would have been easy to slack every now and then. Graham never did. Indeed, he even participated via Zoom from a parking lot as he was making his way across the country to Los Angeles.

By luck of the draw, Graham ended in my section of Contracts in the fall 2021 semester. Once again, Graham impressed me along a number of dimensions. He was an active and engaged participant in class. He was unfailingly prepared, eager to participate, and thoughtful in his questions. He is the type of student I enjoy having in class because he makes the learning environment better for everyone. He also was facilitator of relationships among his classmates. I often would see him engage with his peers, and it was apparent that he was forming strong relationships across the class. A measure of the respect that his colleagues have for him is that they selected him to be the representative from his section to USC Gould's Student Bar Association.

Graham continued to excel when it came to the final exam. If anything, he exceeded my high expectations. He received a grade of 4.2 – an A+ – and was just a tick behind the top grade of 4.3. His essay exam demonstrated that he has mastered the basic skills that we strive to impart to first-year law students. He not only identified the major issues, but he articulated the competing arguments on either side. He also demonstrated strong organizational skill in structuring his response. While no one is a competent lawyer after one year of law school, Graham was about as far along as one could be at this point in the learning process.

Graham spent the summer after his first year as an intern with Navy JAG. I was a lawyer with the Civil Appellate Section of the Department of Justice prior to entering teaching. In that capacity, I gained a deep admiration for JAG attorneys and the crucial work they do for our country. I recommended Graham enthusiastically for the position, knowing that he had both the analytical abilities and personal integrity that being a member of JAG requires. I was pleased when he was chosen. I was even more pleased when I learned that he decided to begin his career with the Army JAG. I recommended him, again enthusiastically and without reservations, for that position as well. I am thrilled that they extended him an offer, and he will be joining them after law school (and, I hope, after clerking!).

One final piece of information. Perhaps the most challenging clinic for our students to be admitted is our International Human Rights Clinic. The demand for slots always exceeds supply, usually by a factor of five or more. My colleague who directs the clinic looks for students that have both exceptional analytical ability and integrity and commitment. She talks about the candidates with faculty members who have taught the students who are applying. That she selected Graham is a testament to the fact that he has earned the respect of those (like me) who have had the privilege of having him in class.

Putting all this together, Graham is a thoughtful young man of great talent, integrity and promise. He inspires trust and confidence in those he interacts with, both his professors and his classmates. He would an outstanding law clerk.

Sincerely,

Robert K. Rasmussen

Robert Rasmussen - rrasmussen@law.usc.edu - 213-740-6473

June 12, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I write to give my strong support for Mr. Graham Smith's application to clerk in your Chambers. I have known Graham since April 2022 when I reviewed his application for enrollment in the International Human Rights Clinic at the University of Southern California ("USC") Gould School of Law, which I direct. He was one of nine students invited to participate in the Clinic for two semesters in the 2022-23 academic year after a competitive interview and application process. During his time in the Clinic as a student attorney thus far, he has worked on average 15-20 hours per week.

In the Clinic, I have supervised Graham on a matter bringing attention to the unfolding atrocity situation in the Anglophone regions of Cameroon since 2017 resulting in around 6,000 deaths and nearly 100,000 refugees. In the fall semester, Graham worked closely with two other Clinic student attorneys to prepare for a briefing with the prosecutor's office of the International Criminal Court ("ICC") in The Hague, The Netherlands, on a 200-page communique submitted by the Clinic alleging perpetration of crimes against humanity by government officials against the civilian population and calling for an investigation into the situation. A communique is akin to a legal brief and requires that the team convince the prosecutor that there is a "reasonable basis" under the legal test established in the Court's Statute for initiating a preliminary examination and eventually an official investigation into the alleged international crimes taking place in Cameroon. As such, the team had to argue persuasively that the factual situation of serious human rights violations against the Anglophone minority populations in Cameroon amounts to the definitions of persecution, deportation and other inhumane acts as crimes against humanity under international law. They also had to demonstrate how the Court has jurisdiction over this situation even though Cameroon is a non-States Party to the ICC, and that the situation rises to the requisite level of gravity warranting outside intervention. In addition, this project required Graham and his teammates to lobby government officials and nongovernmental organizations attending the Assembly of States Parties meeting of the International Criminal Court in The Hague to support the communique. Finally, Graham and his teammates drafted a concept note for organization of a distinguished panel side event to the Assembly of States Parties' meeting, alleging that the situation in Cameroon, like those in Ukraine and Armenia, presently constitute pre-genocidal situations triggering the duty to prevent genocide under the 1948 Genocide Convention.

Having worked closely with Graham on his Clinic assignments, and having clerked myself on the 11th Circuit U.S. Court of Appeals, I can say that he would be a solid law clerk. First, Graham is quite intelligent and is a quick learner. This became evident not only from his work product, but also from my discussions with him in our seminar class and supervision meetings. His questions and comments were always on point as we discussed the assigned reading and how to apply the law to the circumstances of a particular case. I have been particularly struck at how quickly Graham has grasped complex legal issues in areas of law that are completely new to him. For example, one of my very first tasks for Graham was to research and analyze whether the conflict situation factually meets the definition of an "armed conflict" under international law. Not only did he identify the correct caselaw and legal test for the definition of a non-international armed conflict, but he also identified the main weakness for labeling the conflict in Cameroon such due to the lack of organization of armed non-State actors.

Second, Graham has strong research and writing skills. He quickly grasps complex issues and turns around a solid draft efficiently and effectively. His organizational and time management skills stand out. While he is quick in his research and drafting, one area of growth for Graham in the Clinic has been in learning to be more thorough with his research and polished in his very first drafts by proactively reaching out to ask for further direction where the tasking assignment wasn't clear to him. With some direct feedback and guidance on his first drafts, which he incorporated well, his writing became even more organized, consistent and clear.

Finally, Graham has displayed a hard work ethic and always completes his Clinic work in a timely, professional manner. Over the course of the year, he has learned to pay more attention to detail and not let even the smallest things fall through the cracks. As a result of all of the above, Graham has stood out in my Clinic, easily among the top 10%, and I expect to award him an A at the end of this spring semester (for our Clinics, the first semester is graded CR/D/F).

On a more personal level, Graham is a confident young man with a quick sense of humor who is sensitive to the needs of others. In his work, I have found that Graham is utterly dependable and responsible. He takes initiative and is not afraid of challenges. That being said, he is also a team player. In the Clinic, the team reviews each other's research and drafting, maintain the case files, and lead seminar classes together on their casework. Graham's teammates have noted that he is easy to work with and always ready and willing to help. He is proactive in taking on work, plays a natural leadership role, and reliably follows through on his tasks.

For these reasons, I highly recommend Graham as a clerk in your Chambers. If you need any further information about him, please do not hesitate to write or call.

Best Regards,

Hannah Garry

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

June 12, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I write with great pride and enthusiasm in support of the application by USC Gould School of Law 2024 J.D. candidate Graham Smith for a clerkship in your chambers. I taught Mr. Smith in Gould's required first-year Constitutional Law course (focusing on structural issues) in spring 2022 and our required upper-year Constitutional Law course (focusing on rights issues). He is an excellent student, thoughtful and mature, and deeply engaged in the educational process. He would make an outstanding judicial clerk, and I highly commend him to you.

I first met Graham Smith when he was assigned to my section of Constitutional Law: Structure in his 1L year. Our class met in person (after the first couple post-break weeks of Zoom), masked for most of the semester, but my office hours were conducted via Zoom. Although I cold-call, I also address a lot of questions to the class at large for volunteers to answer. Mr. Smith proved up to both forms of challenge and quickly established himself as one of my most regular volunteers, even on occasions when he was more tentative in his thoughts. This to me was a sign that he really was there to learn, not just to get face time or curry favor by speaking up just on things like simple verifiable details from the readings. He was one of the three students who most regularly attended office hours, where he frequently just wanted to confirm his understanding of the material – something I recommend students do. Mr. Smith also earned the respect of his classmates, being chosen by a large team of them to present mini-oral arguments in class on their behalf, arguing that the state of Texas had standing to sue the federal government asserting injury to the state's citizens from a federal mask and vaccine mandate. He acquitted himself and vindicated their trust admirably, drawing on (and sometimes distinguishing) relevant case law and responding quickly and appropriately to questions from classmates and me. He also was the only student brave enough that term to volunteer a sample answer to a past year's more "thematic" essay question for me to address (anonymously) in the review session for the course, again underscoring his genuine desire to learn the material as best he could even at the potential for personal embarrassment along the way. That kind of growth mindset is deeply admirable.

I was then pleased but not surprised when Mr. Smith earned the highest grade I awarded in the class, 4.2/A+. His answer to an essay question asking students to analyze the significance of a scholarly view of congressional powers based on a reading of certain historical material we read synthesized a wide range of material we had studied about the scope of Congress's various constitutional powers. He carefully advanced arguments for which areas would be more and which less affected while identifying tensions between federal efficiency on the one hand and checks on the federal government and state policy experimentation on the other. His answer to a fact-pattern question involving a hypothetical federal law protecting transgender members of the National Guard paid close attention to the facts specified and to differences among various congressional powers and their attendant implications for federalism. He also did a terrific job on a hard set of (closed-book) multiple-choice questions designed to test understanding of a very broad range of the material covered in the course.

Mr. Smith's performance in Constitutional Law: Rights in fall 2022 was also terrific; in a class with heavy representation of third-year students, thehe tied for the third highest grade I awarded, an A/3.8. (The curve for this class ended up not including as high scores as did his first, Constitutional Law: Structure course with me.) As an experiment, I broke from my usual practice of cold-calling on students, instead relying wholly on volunteers. Mr. Smith was the single most willing and definitely the most sophisticated in his answers throughout the semester. He thoughtfully explored potential tensions between broadly worded parts of the Constitution's text and evidence of narrower historical expectations for such text. He emphasized what he views as the importance of moral candor on the part of the Supreme Court in particular. He thoughtfully criticized potentially overbroad readings of the Court's broad holding that under the Constitution the law cannot "give effect to" private prejudices. All of this contributed immensely to our class discussions. And while some of his classmates with a year more experience with law school writing earned higher grades in the course, Mr. Smith's essay answer regarding the potential implications of the Supreme Court's Dobbs decision overruling Roe v. Wade for rights of access to contraceptives thoughtfully articulated arguments on each side of the question before settling on his recommendation – which also creatively offered the Justice for whom he was hypothetically clerking the option of ducking the merits issues in the suits. Moreover, he achieved the highest score on the (again, closed-book) multiple choice questions, further demonstrating his mastery of the broad swath of precedent and doctrine covered in the course.

I have had the privilege of teaching at the USC Gould School of Law for decades, and Graham Smith ranks among my finest students. His GPA puts him comfortably in the top tenth of his class, and he has achieved that while being significantly involved in leadership positions on campus and extensive pro bono service. Everything I have seen of his character, including his treatment of students with whose arguments he may disagree, commends him as an impressive candidate for the US Navy JAG Corps, which he will be joining after law school and any clerkship. His experience in Gould's immigration clinic and his time in summer 2023 at Sullivan & Cromwell will go far toward ensuring he enters a post-graduation judicial clerkshiip with terrific skills. Graham Smith is intelligent, honorable, and driven and will be a credit to Gould and to the legal profession. As a former federal (appellate) clerk myself (for the late Hon. Edward R. Becker), I do not see how you could go wrong selecting Mr. Smith for a clerkship, and I unreservedly recommend that you do so.

All best regards,

David Cruz - dcruz@law.usc.edu - 213-740-2551

David B. Cruz

David Cruz - dcruz@law.usc.edu - 213-740-2551

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

No. 20-303

UNITED STATES,

Petitioner,

-v.-

JAMES ROBERTSON,

Respondent.

ON WRIT OF CERTIORARI

TO THE TWELFTH CIRCUIT UNITED STATES COURT OF APPEALS

_____

BRIEF FOR PETITIONER

_____

Participant 121
Co-Counsel for Petitioner
University of Southern California
Law Center
Los Angeles, CA 90089-0071
Telephone (213) 740-7331
Email: Student@.usc.edu

QUESTIONS PRESENTED

I. Did the district court correctly dismiss a defendant's motion to withdraw a guilty plea because the Sixth Amendment right to counsel had not attached during preindictment plea negotiations?

II. If the defendant had a right to effective assistance of counsel, did the district court correctly dismiss defendant's motion to withdraw a guilty plea because the attorney's conduct met objective standards of reasonableness and did not prejudice the defendant?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Miscellaneous

OPINIONS BELOW

On February 3, 2020, Assistant United States Attorney (AUSA) Carli Zimelman opened a grand jury investigation into James Robertson. R. at 24. On June 9, 2021 as a part of this investigation, the government obtained a search warrant for Robertson's home at 300 Pacific Street. R. at 24. The search was executed June 10, 2021. R. at 49.

Following the execution of the search warrant, Robertson was arrested and arraigned in the United States District Court for the District of Gould on June 11. R. at 13. On June 20, a grand jury indicted Robertson on the charges of conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956(h); seven counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i); and two counts of tax evasion, in violation of 26 U.S.C. § 7201. Id.

On July 7, Robertson filed a motion to suppress all evidence obtained by the use of an advanced pole camera including the fruits of the June 10 search. R. at 31. On July 23, the district court denied Defendant's motion to suppress evidence. R. at 25–37.

On July 30, Robertson entered into a plea agreement with the prosecutors in which he agreed to plead guilty to one charge of conspiracy to commit money laundering, in violation of 18

U.S.C. §§ 1956(a)(1)(B)(i) and 1956(h), and one charge of tax evasion, in violation of 26 U.S.C. § 7201. R. at 39.

On August 10, Robertson filed a motion to withdraw his guilty plea pursuant to Fed. R. Crim. P. 11(d)(2)(B) alleging that he received ineffective assistance of counsel during preindictment plea negotiations. R. at 65. On August 20, the district court denied Robertson's motion to withdraw his guilty plea. R. at 69. The district court held that the Robertson's right to counsel did not attach during the preindictment plea negotiations because those negotiations took place before any "formal criminal proceedings." R. at 66–69. The district court also concluded that Robertson could not show ineffective assistance of counsel because his attorney's conduct was not deficient, and Robertson was not prejudiced by the representation. Id.

On August 1, 2022 the United States Court of Appeals for the Twelfth Circuit vacated the ruling of the district court and remanded for further factfinding. R. at 93. On the first issue, the Twelfth Circuit held that the warrantless use of the advanced pole camera for an extended period constituted an unconstitutional search under the Fourth Amendment. R. at 80–86. On the second issue, the Twelfth Circuit found that Robertson's Sixth Amendment right to counsel attached during

preindictment plea negotiations, and his attorney's actions constituted ineffective assistance of counsel. R. at 86–93.

This Court granted Robertson's petition for certiorari to resolve two questions. R. at 94. First, did the district court correctly deny a defendant's motion to suppress evidence based on a finding that the government did not violate the defendant's Fourth Amendment rights by using a "military-grade" camera mounted on a utility pole to record events occurring in and around the defendant's residence for a period of twenty-two months without first securing a warrant authorizing the use of that camera? Id. Second, did the district court correctly deny a defendant's motion to withdraw a guilty plea pursuant to Fed. R. Crim. P. 11(d)(2)(B) based on a finding that the defendant's Sixth Amendment right to the effective assistance of counsel had not attached during preindictment plea negotiations? Id.

CONSTITUTIONAL AND STATUTORY OPINIONS INVOLVED

U.S. Const. amend. V, in relevant part

". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . . ."

U.S. Const. amend. VI, in relevant part

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

18 U.S.C. § 1956(a)(1)(B)(i)

"Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial

transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine . . . or imprisonment."

18 U.S.C. § 1956(h)

"Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

26 U.S.C. § 7201

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Fed. R. Crim. P. 11(d)(2)(B)

"A defendant may withdraw a plea of guilty or nolo contendere . . . [if] the defendant can show a fair and just reason for requesting the withdrawal."

STATEMENT OF FACTS

Defendant-Appellant James Robertson conducted illicit business transactions with narcotics dealers on his property at least seven times between July 2019 and June 2021. R. at 5–7. Robertson conducted these transactions in view of a pole camera that the government was using as part of a long investigation. R. at 57–59. During the investigation, prosecutors offered to engage in a preindictment plea negotiation. R. at 57. Robertson's attorney recommended that Robertson reject the government's plea offer, and defendant was subsequently indicted

for his illicit transactions. R. at 56, 59. After an unsuccessful motion to suppress evidence, Defendant entered into a plea agreement, pled guilty, switched counsel, and motioned to withdraw the guilty plea alleging ineffective assistance of counsel. R. 49–51. The district court denied the motion. R. at 69.

James Robertson is a resident of Gould City, Gould who engaged in illicit money laundering between the July 2019 and June 2021. R. at 10, 39. Robertson owned a home at 300 Pacific Street, and during a 22-month period he conducted money laundering operations on that property. R. at 40.

Special Agent Adrian Reyna is an investigator for the FBI who orchestrated the investigation into Robertson's illicit dealings. R. at 17–20. Reyna procured an advanced camera from a friend and set it on a pole near Robertson's home after receiving approval from his supervisors. R. at 18–20. Reyna collected evidence of Robertson's crimes, and turned over the information over to AUSA Carli Zimelman. R. at 19–20.

AUSA Zimelman opened a grand jury investigation into James Robertson on February 3, 2021. R. at 23. The grand jury subpoenaed bank documents and other information related to the investigation. Id.

On May 18, 2021, AUSA Zimelman sent a letter to Robertson regarding the grand jury investigation. R. at 58. The letter

offered Robertson the opportunity to testify before the grand jury, and it offered the opportunity to engage in plea negotiations. Id. The letter noted that the government anticipated possibly bringing charges against Robertson "in the near future." R. at 52–53. Robertson received the letter and informed his attorney, Joy Chen, that he did not want to testify, but he might be interested in a plea negotiation. R. at 49. Robertson, however, continued to tell Chen that he was not guilty. Id.

Joy Chen is an attorney that has advised Robertson on numerous matters over the past 18 years. R. at 13. Chen met with AUSA Zimelman to discuss a potential plea negotiation. Id. AUSA Zimelman orally mentioned that if Robertson pled guilty in the next two weeks, the government would be willing to allow him to plead guilty to a single count of tax evasion, stipulate that his illicit earnings totaled $200,000, and recommend the low end of the sentencing guidelines. R. at 56.

Chen did not believe she could assess the plea deal's value, and she asked AUSA to provide preindictment discovery. R. at 56. AUSA Zimelman refused to provide preindictment discovery because documents were not yet prepared and preparing for discovery would undermine the time and effort benefit to a preindictment plea negotiation. R. at 56. While AUSA Zimelman has not provided preindictment discovery before and the practice

is rare, this refusal left Chen reliant on Defendant's claims of innocence when conducting her analysis. R. at 59, 54, 56.

Chen explained the basic terms of the potential plea to Robertson, and she told him the government wanted him to plead guilty to a single count of tax evasion. Id. Chen also explained to Robertson that tax charges often carry a lesser sentence than money laundering, and she informed Robertson that she was not able to determine the value of the offer because she did not have discovery information. Id. Without the discovery information, and based on Robertson's claims of innocence, Chen recommended that Robertson not accept the offer. R. at 56. Robertson did not accept the offer. R. at 56.

After Robertson denied the potential plea agreement, AUSA Zimelman undertook additional investigatory steps, working with the FBI to obtain a new search warrant to search Robertson's home. R. at 59. The warrant was supported by an affidavit which relied on evidence obtained by a pole camera. R. at 24. After searching the home, AUSA Zimelman asked the grand jury to issue an indictment charging Defendant Robertson with one count of conspiracy to commit money laundering seven counts of money laundering, and two counts of tax evasion. Id.

On June 10, 2021, Robertson was arrested. R. at 64. The next day, he was arraigned on a complaint charging him with one count of conspiracy to commit money laundering. Id.

The grand jury returned the indictment, charging Robertson with one count of conspiracy to commit money laundering, seven counts of domestic money laundering, and two counts of tax evasion. Id. The matter was set for trial. Id. After the indictment, Chen reviewed discovery material, and filed a timely motion to suppress the evidence on the grounds that it was obtained by an illegal search. R. at 59. The motion was dismissed. R. at 69.

Chen reached out to AUSA Zimelman to pursue a plea agreement. R. at 59. AUSA Zimelman submitted a formal plea agreement offer in writing that would require Robertson to plead guilty to one count of conspiracy to commit money laundering and one count of tax evasion. Id. In the agreement, Robertson retained the right to appeal the denial of his motion to suppress evidence. R. at 46. In exchange, Robertson was promised an anticipated sentence of 78–97 total months. R. at 50. Robertson accepted the plea agreement. R. at 47.

After accepting the plea, but before sentencing, Robertson fired his attorney, and he hired Elle Infante as her replacement. R. at 51. Infante, after reviewing Chen's notes on the preindictment plea deal, recommended that Robertson file a motion to withdraw his guilty plea on the grounds that he received ineffective assistance of counsel. Id. He made this

motion, and the court denied it on the grounds that his Sixth Amendment rights had not yet attached. Id.

SUMMARY OF ARGUMENT

This Court should reverse the Twelfth Circuit's order to vacate and remand because the right to counsel does not attach during preindictment plea negotiations. The Court has consistently held that this right to counsel cannot attach to proceedings that occur before the commencement of formal judicial proceedings. The Court should affirm this precedent and explicitly redraw a bright line for Sixth Amendment attachment at the first formal criminal charging proceeding because that clear rule reflects the text and purpose of the Sixth Amendment, it aligns with the beginning of the adversarial process, and it provides clear guidance for courts and states.

Applying the bright-line rule, Robertson's Sixth Amendment right to counsel did not attach during his preindictment plea negotiations because these negotiations occurred before any formal proceedings. Even if the Court abandons the bright-line rule, the right to counsel will not attach during Robertson's preindictment plea negotiations because even under a case-by-case approach this matter was still in the investigatory stage during the offer to negotiatene. Thus, the right to counsel did not attach to Robertson's preindictment plea negotiations.

Even if Robertson has a right to counsel, he was not prejudiced by ineffective assistance of counsel because Joy Chen's conduct was sufficient. To prove ineffective assistance of counsel, a defendant must show that the attorney's conduct fell below objective standards and that the defendant was prejudiced by the attorney's conduct. Chen met objective standards of reasonableness because her actions fell within the wide range of acceptable conduct. Chen presented the government's offer to Robertson, explained the relative punishment for the charge, and counselled him despite the limited available information.

To show prejudice resulting from a rejected plea offer, Robertson must show that he would have accepted the plea offer. Robertson cannot show that he would have accepted because at the time of the offer, he actively maintained his innocence. Furthermore, there is no evidence that the prosecutor or judge would allow the offer to go into effect. Thus, Robertson cannot prove ineffective assistance of counsel due also to a lack of prejudice.

Without proving that his Sixth Amendment right attached, and without proving he was prejudiced by ineffective assistance of counsel, there was no reason to allow a withdrawal of Robertson's guilty plea pursuant to Fed. R. Crim. P.

11(d)(2)(B). The Court should accordingly reverse the Twelfth Circuit's decision to vacate the ruling of the district court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED ROBERTSON'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE A BRIGHT-LINE RULE IS THE PROPER STANDARD FOR DETERMINING HIS RIGHT TO COUNSEL HAD NOT ATTATCHED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Amendment's specific language limits its applications to the context of an "accused" during a "criminal prosecution." See Rothgery v. Gillespie Cnty, 554 U.S. 191, 214 (2008) (J. Alito concurring). To enforce these textual limitations, the Court determines whether a defendant's Sixth Amendment rights have attached as a threshold matter before addressing whether the rights were violated. See Id. at 212 (distinguishing the question of attachment from the critical stage inquiry). Outside of this narrowly defined right to counsel, other Amendments protect individuals from government investigation. See Escobedo v. Illinois, 378 U.S. 478 (1964).[1]

[1] Escobedo, a case in which the Court held that the right to counsel attached during a preindictment interrogation, was originally decided on Sixth Amendment grounds, but it has subsequently been read to support the Fifth Amendment right to counsel. See Johnson v. New Jersey, 384 U.S. 719 (1966).

Here, the district court properly denied Robertson's motion to withdraw a guilty plea based on ineffective assistance of counsel because criminal proceedings had not commenced when Robertson was negotiating for a plea deal. Therefore, Robertson's Sixth Amendment right to counsel had not attached, and the district court did not abuse its discretion.

A. Standard Of Review

A district court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. United States v. Conroy, 567 F.3d 174, 177 (5th Cir. 2009). The district court has the discretion to grant a motion to withdraw a guilty plea for "any fair and just reason" pursuant to Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 11(c)(1)(B). A Sixth Amendment violation would be a sufficient reason, and whether the Sixth Amendment right to counsel attaches during preindictment plea negotiations is a question of law which is reviewed de novo. United States v. Moody, 206 F.3d 609, 613 (6th Cir. 2000).

B. The Court Should Enforce a Bright-line Rule That the Right To Counsel Does not Attach Until Formal Criminal Charging Proceedings Because the Sixth Amendment's Purpose and Text Limit Its Application to Protect the Accused During Criminal Proceedings, the Parties Have Not Become Adversarial Before A Formal Proceeding, And this Rule Provides Clear Guidance To the States.

The Court has consistently reinforced a rule that a defendant's Sixth Amendment right to counsel attaches "only at

or after the time that adversary judicial proceedings have been initiated against him." Kirby v. Illinois, 406 U.S. 682, 688 (1972). The Court has identified this time as the "first formal charging proceeding" which may include a formal charge, preliminary hearing, indictment, information, or arraignment. Moran v. Burbine, 475 U.S. 412, 428–29 (1986). This rule "forecloses" the application of the Sixth Amendment to events "before the initiation of criminal proceedings." United States v. Ash, 413 U.S. 300, 303 n.3 (1973). Lower courts have adopted this rule and referred to it as a "bright-line rule" that clearly marks formal criminal charging proceedings as the point of attachment for the right to counsel. See, e.g. United States v. Turner, 885 F.3d 949 (6th Cir. 2018). But see, e.g. United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992)(holding that precedent created only a rebuttable presumption that the right attaches at formal proceedings).

1. The Bright-Line Rule Properly Reflects the Purpose and Text of the Sixth Amendment by Ensuring the Protection of an Accused During Criminal Proceedings and Trial.

The "core purpose" of the Sixth Amendment's guarantee of counsel is "to assure aid at trial." Gouveia, 467 U.S. at 188 (citing Ash, 413 U.S. at 309). In Gouveia, the Court considered whether the right to counsel attached during the administrative separation of an inmate that occurred before any formal charge.

See Gouveia, 467 U.S. 180. The Court maintained that the Sixth Amendment does not attach until after the "initiation of adversary judicial proceedings" because drawing the line there ensures the purpose of the Amendment is served by protecting defendants at trial without needlessly providing individuals with a "preindictment private investigator." Id. at 187, 191.

Additionally, the Amendment's plain language limits the right to "all criminal prosecutions." U.S. Const. Am. VI. This language was carefully chosen to contrast with the language "any criminal case" which is operative in the Fifth Amendment. U. S. Const. Am. V. See Rothgery, 554 U.S. at 222 (J. Thomas dissenting) (citing Counselman v. Hitchcock, 142 U.S. 547 (1892)). These linguistic distinctions emphasize the Sixth Amendment's focus on protecting defendants at trial, while the Fifth Amendment extends to protect individuals from questioning in preindictment situations. Id. For example, in Moran v. Burbine, 475 U.S. 412, 430–31 (1986), the Court confirmed that the right to counsel did not attach during preindictment police questions because "its [the Sixth Amendment's] purpose" and "its very terms" confirm the teaching that the right "does not attach until after the initiation of formal charges," and the relevant questioning came before that clear point.

The Court should apply a bright-line rule because that rule protects an accused at trial in accord with the purpose and text

of the Amendment. Like in Gouveia, in which the Court adhered to the text and purpose of the Sixth Amendment by refusing to extend protections to preindictment proceedings, the bright-line rule respects the Sixth Amendment's purpose by ensuring that the right to counsel applies during criminal proceedings but only after they have begun. Furthermore, like the Court's approach in Gouveia, this rule avoids establishing a "preindictment private investigator" by preventing attachment before formal proceedings.

The bright-line rule is also proper because it reflects the textual limitations of the Sixth Amendment. Like the Court's approach in Moran, in which it relied on the text of the Sixth Amendment when enforcing a clear rule limiting attachment to interrogations *after* initial formal criminal proceedings, the bright-line rule respects the Amendment's textual commitment to an accused and a trial by limiting the right to counsel. Thus, bright-line rule reflects the text and purpose of the Amendment.

2. The Bright-Line Rule Accurately Identifies the Filing of Proceedings as the Point at Which the Prosecution's Case Solidifies, the Parties Become Adversarial, and Defendants Require Counsel.

The focus of initiation of criminal proceedings is not "mere formalism" because it marks at which the "adverse positions of government and defendant have solidified." Kirby, 406 U.S. at 689. Before the initiation of criminal proceedings,

there is not as much need for counsel because the government has not completed its investigation, become adversarial, and the prosecution has not "committed itself to prosecute." Id. For example, in Rothgery, the Court considered an initial arraignment before a judge, and the Court found that the Sixth Amendment attached at these judicial proceedings because this is the point when the "State's relationship with the defendant has become solidly adversarial." 554 U.S. at 202.

Here, the Court should enforce the bright-line rule because it aligns with the point at which the prosecution's case has solidified and the parties become adversarial. The bright-line rule's focus on the formal judicial proceedings identifies this critical difference in the position of the prosecution before and after the initiation of criminal proceedings. Like the Court's approach in Rothgery, in which the Court looked for a formal judicial proceeding to identify whether the Sixth Amendment right attached because the it showed the prosecution's commitment to prosecute and the adversarial position of the parties, the bright-line rule also looks at the initial formal proceeding as a commitment to prosecute that makes the parties adversarial. Thus, the Court should apply the bright-line rule because it accurately marks where the prosecutor has become adversarial, and counsel is needed.

3. A Bright-Line Rule Provides Clear and Actionable Guidance for the States That Rely on this Rule.

States rely on the consistency of this precedent as a clear rule when establishing programs that provide counsel to indigent defendants. See Rothgery, 554 U.S. at 203–05, n.14. States are required to provide counsel to indigent defendants when the right to counsel attaches. See Gideon v. Wainwright, 372 U.S. 335 (1963). When crafting legislation to meet this obligation, the District of Columbia and 43 States haven take steps to appoint counsel "before, at, or just after initial appearance." Rothgery, 554 U.S. at 203–05, n.14. For example, in California, the Penal Code has been crafted to ensure that a defendant has counsel beginning "[w]hen the defendant first appears for arraignment." Cal. Penal Code § 858(a)(2022).

The Court should employ the bright-line rule and refuse to stretch the Sixth Amendment's protections because states rely on the rule's clarity when the crafting public defense programs. At any point, individual states could choose to extend public defense programs to pre-criminal proceedings, but the majority of states, including California, align the start of their programs with the bright-line rule. This reliance shows consensus on both where the line should be drawn and the rule's workability. Without a well settled bright-line rule connected to formal proceedings, states would need to recraft their

policies to investigate individual situations and determine when to provide counsel. This is far more onerous and unworkable. Thus, the court should follow the bright-line rule because its clarity provides the basis for state programs.

In sum, the Court should apply the bright-line rule because it reflects the text and purpose of the Sixth Amendment, it marks the point when the parties can be truly adversarial, and many states consistently rely on this rule.

C. Robertson's Sixth Amendment Right to Counsel Did Not Attach During His Preindictment Plea Negotiations Because the Negotiations Came Before Formal Charges.

Under the bright-line rule, the Sixth Amendment attaches only "after the initiation of formal charges." Moody, 206 F.3d at 614 (citing Moran, 475 U.S. at 431.). Formal charges include arrests, indictments, and arraignments. Kirby, 406 U.S. at 689. On the other hand, less formal procedures like target letters and plea offers do not qualify as formal judicial proceedings. See United States v. Hayes, 231 F.3d 663 (9th Cir. 2000)(en banc)(Target Letters). For example, in Hayes a suspect was served with a target letter indicating that the government might seek indictments against him, but his Sixth Amendment rights had not yet attached because the prosecution filed no formal charges, the investigation was ongoing, and no charging decisions had been made when the letter was sent. Id. at 669.

A minority of courts recognize potential exceptions to the bright line rule when the government has "crossed the constitutionally significant divide from fact-finder to adversary." Larkin, 978 F.2d at 969. Because there is still a presumption that that the right does not attach, such situations must be "extremely limited." Roberts v. Maine, 48 F.3d 1287, 1291 (7th Cir. 1995). For example, in Roberts, a court considered whether forcing a suspect take a blood test crossed that line. Id. The circuit court found that the government had not crossed the line because the police were still waiting on the outcome of their investigation. Id.

Here, the right to counsel did not attach during Robertson's preindictment plea negotiations because formal criminal proceedings had not been filed. Like in Hayes, in which the right to counsel did not attach during preindictment plea negotiations because the prosecution had not brought formal charges, the right to counsel did not attach during Robertson's preindictment plea negotiations because AUSA Zimelman had not yet brought formal charges against Robertson. Also like in Hayes, in which a prosecutor's target letter did not trigger Sixth Amendment attachment because it only hinted at possible charges, AUSA Zimelman's letter does not trigger Sixth Amendment attachment because and her letter only vaguely alluded to potential future charges. Thus, under the bright-line rule,

Robertson's Sixth Amendment right to counsel did not attach during his preindictment plea negotiations.

Even if the Court applied the rule used by a minority of courts, Robertson's Sixth Amendment did not attach because the government was still an investigator. AUSA Zimelman's letter to Robertson invited him to testify. After negotiations ended, AUSA Zimelman continued to investigate and worked with the FBI to get another search warrant. Finally, AUSA Zimelman noted that she could not produce discovery because that would require an assembly of evidence that she had not yet completed. Like in Roberts, in which the Sixth Amendment did not attach because the proceeding came in the middle of the investigation, Robertson's Sixth Amendment had not attached because the plea negotiations came in the middle of the FBI's ongoing investigation. Thus, Robertson's right to counsel did not attach even under the alternative rule.

In sum, under the bright-line rule, Robertson's Sixth Amendment right to counsel did not attach during preindictment plea negotiations because the government had not brought formal charges. Additionally, under the alternative rule, Robertson's right to counsel did not attach because the government was still investigating.

II. EVEN IF ROBERTSON'S SIXTH AMENDMENT RIGHTS ATTACHED, THE DISTRICT COURT CORRECTLY DISMISSED THE MOTION BECAUSE COUNSEL'S ERRORS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

When the Sixth Amendment attaches, it grants the defendant the right to an "effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that this right has been violated, a defendant must show that (1) counsel's conduct "fell below an objective standard of reasonableness" and (2) that the defendant was "prejudiced" by the deficiency. Id. Reaching this "high bar" is "never an easy task" because judicial scrutiny of attorney performance must be "highly deferential." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

Here, the district court did not abuse its discretion when it dismissed Robertson's motion to withdraw because Chen's conduct was sufficient and Robertson cannot show that he would have accepted the offer absent Chen's actions.

A. Standard of Review

Although a district court's decision to deny a motion to withdraw a guilty plea is reviewed for abuse of discretion, the Court would necessarily abuse its discretion if there was a valid claim for ineffective assistance of counsel. Conroy, 567 F.3d at 177. Claims of ineffective assistance of counsel are

reviewed du novo. Chandler v. United States, 218 F.3d 1305, 1312 (11th Cir. 2000).

B. Chen's Representation of Defendant was Not Deficient Given That She Adequately Informed Him of the Benefits of the Potential Plea Agreement and Her Concerns.

While there are few standards of reasonableness in negotiations, if the prosecution makes a "formal" offer favorable to the defendant, then defense counsel must "communicate" it to the defendant. Missouri v. Frye, 566 U.S. 134, 145 (2012). Defense counsel need only inform a defendant "of the advantages and disadvantages" of that potential plea agreement. Libretti v. Unites States, 516 U.S. 29, 50 (1995). For example in Parsley v. United States, 604 F.3d 667, 672 (1st Cir. 2010), the court considered claims that counsel failed to meet objective standards because they did not urge a defendant to plead guilty, but the court denied the claim because counsel conveyed the agreement, explained the advantages, and made a "reasonable strategic choice" based on an evaluation of the discovery materials. Furthermore, the Court in Burt v. Titlow, 571 U.S. 12, 22 (2013), found that a defendant's proclamation of innocence "may effect the advice that counsel gives." Finally, in Frye, a defense counsel's conduct fell outside the scope of acceptable conduct because counsel received a formal written and defined plea offer, and counsel completely failed to mention the offer to the defendant. 566 U.S. at 145.

Here, Chen's conduct was sufficient because she adequately informed him about the nature of the prosecution's plea offer and the ambiguities surrounding it. Like in Parsley and Burt, in which defense counsel met objective standards by making a reasonable reccomendation based off discovery materials and the defendant's claimed innocence, Chen relayed the basic terms of the agreement, conveyed the relative punishment for the guilty plea, and explained her reasonable hesitance to accept a deal given the lack of discovery and Robertson's claims of innocence. Unlike the offer in Frye, which was written down with specific parameters, Chen was orally told of an offer in which prosecution "would be willing to allow him to plead to" a single count and a recommended sentence "on the low end." Because of the vague nature of the plea, there was no way for Chen to know the advantages and disadvantages of that strategy. Thus, Chen's conduct was effective to the best of her abilities given the limited access to information and Robertson's proclaimed innocence.

C. Even if Chen's Actions Were Ineffective, Robertson Was Not Prejudiced by the Acts of Counsel Because He Maintained Innocence at the Time of the Negotiation and the Agreement is Too Indefinite to Show That the Agreement Would Have Been Accepted.

To show prejudice from alleged ineffective assistance of counsel when the defendant rejects a plea agreement, the defendant must show that the "end result" of the criminal

process would have been "more favorable." Frye, 566 U.S. at 147. To show this, the defendant must show that there was a reasonable probability that (1) they would [have] accept[ed] the earlier plea offer" had counsel been effective, (2) the prosecution would not have withdrawn the offer, and (3) the judge would block its acceptance. Id. See also, Lafler v. Cooper, 566 U.S. 156 (2012).

Here, while prosecutors and judges have discretion, Robertson may be able to show a reasonable probability that prosecution would have kept the offer open, and that the court would have accepted the agreement. Nonetheless, he cannot prove prejudice because he cannot show that he would have accepted the offer.

1. Robertson Cannot Prove That He Would Have Accepted the Offer Because He Was Maintaining His Innocence and the Offer Was Ambiguous.

To prove prejudice when counsel failed to communicate a plea offer, a defendant must show a "reasonable probability" that they would have accepted the plea offer. Frye, 566 U.S. at 148 (2012). A defendant's later decision to accept a less generous plea offer is "insufficient to demonstrate" that a defendant would have pleaded guilty to an earlier, more favorable plea. Id. at 150. Additionally, a defendant's later claims that he would accept a plea negotiation is subject to heavy skepticism. United States v. Day, 969 F.2d 39, 46 n.9 (3rd Cir. 1992). For example, in Merzbacher v. Shearin, 706 F.3d 356, 360 (4th Cir.

2013), a defendant's counsel never communicated a plea offer to the defendant who later claimed he would have accepted the offer. Nonetheless, the defendant could not show that he was prejudiced because the plea offer's indefiniteness and the defendant's continued maintenance of his own innocence made his post hoc testimony less credible and prevented him from establishing a "reasonable probability" that he would have accepted the offer. Id. at 366–67.

Here, Robertson cannot prove that he would have accepted the offer because the offer was indefinite and, at the time of the negotiation, he was still alleging his innocence. Although Robertson mentioned that he was interested in pursuing a plea negotiation, he told Chen that he was "not guilty of money laundering." Like in Merzbacher, in which a defendant's maintenance of his innocence and the imprecision of the offer prevented the defendant from later alleging he would have accepted the offer, Robertson's maintenance of his innocence and his inability to assess the strength of the government's case at the time of the offer prevents him from proving that he would have accepted the offer. Without a reasonable probability that he would have accepted the offer, there is no prejudice, and Robertson cannot prove ineffective assistance of counsel.

CONCLUSION

The Court should reverse the ruling of the Twelfth Circuit because the right to counsel does not attach during preindictment negotiations, and even if it did, Robertson cannot prove ineffective assistance of counsel. Without proving both, Robertson cannot assert a fair and just reason to withdraw his plea, and his motion to withdraw was correctly dismissed by the district court.

DATED: December 15, 2022

Respectfully Submitted,
Student Attorney
Co-Counsel for Respondent

Note: The following is a writing sample that I wrote as a final for my Judicial Opinion Writing course. The research and writing are entirely my own. If you would prefer a different sample of writing, I am happy to provide an appellate brief of comparable length. Please let me know if you would prefer an alternative.

SUPREME COURT OF THE UNITED STATES

No. 21–869

ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, PETITIONER v. GOLDSMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December 2, 2022 – **USC LAW 873**]

JUSTICE SMITH delivered the opinion of the Court

Andy Warhol was a transformative artist. No party in this case nor member of this Court doubts that fact, but this statement relies on the colloquial definition of the word transformative. In the legal context of fair use established under Section 107(1) of the Copyright Act of 1976, 17 U.S.C. § 107(1), courts must use a more refined understanding of the word transformative to comport with the framework of statutes and precedent that define which purposes support a claim for fair use. Today, we use the latter understanding of the word in considering whether the Andy Warhol Foundation (AWF)'s use of Lynn Goldsmith's photograph was so transformative that it supports a claim for fair use under 17 U.S.C. § 107(1). On that question, we hold that the work was not transformative, and we affirm the conclusion of the Second Circuit.

I

Lynn Goldsmith is a successful photographer who gained a reputation for her iconic portraits of musicians. Andy Warhol was one of the most significant artists of the twentieth century, and his innovative works of contemporary art are revered worldwide. This case is about one of Warhol's follow-on works that used one of Goldsmith's photographs.

In 1981, Goldsmith took a photograph of Prince. At that time, Prince was a musician on the rise to stardom. Goldsmith's photograph was part of a two-day photo shoot where Goldsmith was capturing photos for Newsweek Magazine. Goldsmith had staged the photo and applied makeup that emphasized Prince's "vulnerable" nature. The photoshoot was cut short because Prince became uncomfortable and left after only twenty photographs. Newsweek never used any of the photos taken that day, and Goldsmith retained the rights to the photographs including the one that is at issue in this case.

2

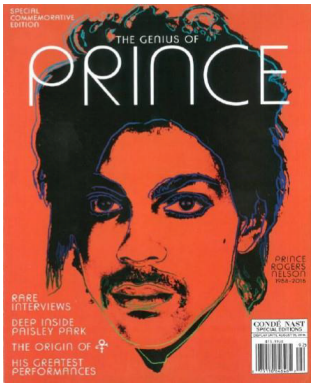
In 1984, Vanity Fair, another magazine, contracted with Goldsmith to use her photograph. Instead of using the photograph on its own, Vanity Fair contracted with Goldsmith to use her photograph as an artist's reference that Warhol would work with to create an illustration for the magazine in his classic style. The agreement between Vanity Fair and Goldsmith limited Vanity Fair's license to one use of the photograph as an artist's reference for a work which could appear "one-time full page and one-time under one quarter page." J.A. 85. The agreement further specified that Goldsmith's name appear on the published work, and that Goldsmith retained all other rights to use the photograph including the rights to potential derivative works.

To create an image that Vanity Fair would accept, Warhol produced a series of silkscreen works with varying colors and styles, but each version was recognizably based on the Goldsmith photograph. Each new work contained some manipulation of color, cropping, and shading that physically distinguished the Warhol works from the Goldsmith photograph. From this series (the Prince Series) Vanity Fair chose Purple Prince, but the series also included Orange Prince, the subject of this suit. Orange Prince clearly resembles Goldsmith's photograph, but Warhol removed Prince's body, changed the base color from white to orange, and made several other alterations. After Andy Warhol's death, the rights to Orange Prince, along with the rest of the Prince Series, passed to the Andy Warhol Foundation.

Orange Prince

Purple Prince

When Prince died in 2016, Condé Nast, Vanity Fair's parent company, wanted to publish an article on Prince's life and reached out to AWF to license Orange Prince. Goldsmith was not informed of this transaction, and she was not compensated. In fact, she only learned about the transaction when the image appeared on the cover of Condé Nast and she recognized her own photograph.



Goldsmith informed AWF that the use of the Prince Series violated her copyright. In response, AWF filed for a declaratory judgment seeking a judgment that (1) none of the works in the Prince Series used copyrightable elements of Goldsmith's 1981 photograph; and/or (2) the Prince Series is protected as "fair use."

Goldsmith filed counterclaims for damages based on the violation of her copyright, and both parties filed cross-motions for summary judgment.

The district court granted the AWF's motion for summary judgment on the grounds that the entire Prince Series was fair use. The court reviewed the series under the fair use factors established in Section 107, 17 U.S.C. § 107, and concluded that Warhol's manipulation of the original work entitled him to fair use protection as a matter of law. On the first factor, "the purpose and character of the use," the court applied a test from *Campbell v. Acuff-Rose Music, Inc.* and found that the work was transformative because the two works conveyed distinct messages. 510 U.S. 569 (1994) (citing 17 U.S.C. § 107). The Goldsmith photograph, on the one hand, showed Prince as a "vulnerable human being," and Orange Prince, on the other hand, depicts Prince as an "iconic larger-than-life figure." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019). The trial court further explained that the "Prince Series is immediately recognizable as a 'Warhol' rather than a photograph of Prince." *Id.* In the district court's view, this "new expression" combined with physical changes to the work made the Prince Series transformative. *Id.* at 325–26. After considering the other factors as well, the trial court concluded that the Prince Series was fair use and granted AWF's motion for summary judgment. *Id.* at 331.

The Second Circuit reversed the district court's ruling, vacated the summary judgment, and remanded for further proceedings based on the trial court's improper inquiry into the message or meaning of the works. The Second Circuit found that

the judge should not "assume the role of art critic and seek to ascertain the intent behind the work at issue." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2nd Cir. 2021). After stating these judicial limitations, the Second Circuit split the § 107(1) inquiry into two considerations. First, the Second Circuit looked for visual distinctions between Orange Prince and the Goldsmith photograph because transformative works, at the "bare minimum," must do more than just impose a new style on a new work. *Id*. at 42. On this question, the Second Circuit found that the Warhol, even though it is *a Warhol*, was not visually distinct enough to qualify as transformative under the first fair use factor. *Id*. After a review of the other fair use factors, the Second Circuit reversed vacated, and remanded. *Id*. at 54.

AWF petitioned to this Court on a very specific issue–whether the Second Circuit erred by failing to consider the message-or-meaning test from *Campbell*. AWF framed the question presented specifically around factor one of the fair use analysis under 17 U.S.C. § 107(1). We granted certiorari on that question, and the parties have sufficiently briefed only this aspect of the fair use analysis. Thus, our analysis and our holding are limited to that factor.

II

The Constitution empowers Congress to protect the interests of artists by granting them the "exclusive right to their writings." U.S. Const. art I, § 8. In the same clause, the Constitution specifies the purpose of those protections as the promotion "of Science and useful Arts." *Id*. Congress has used this power to pass

copyright laws protecting the rights of artists and photographers, and this Court has upheld those laws. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Thus, the legal framework for a fair use analysis comes from both statutes and our caselaw.

A

Congressional statutes form the basis of the modern fair use framework. The Copyright Act of 1976 established guidelines for the protection of follow-on works. Under the act, original creators possess the rights to their original creations as well as the exclusive right to produce derivative works. The act defines a derivative work as "a work based upon one or more preexisting works," and the act provides examples like "musical arrangement, dramatization, fictionalization, motion picture versions." 17 U.S.C. § 101. Original creators still possess exclusive rights to the derivative work even if there is a significant change of form or if the follow-on creator has taken artistic liberties. The classic example of these protections is a book author's right to retain the movie rights for their book.[1]

Another form of follow-on work is fair use. Original creators do not have an exclusive right to works that qualify as fair use. The 1976 statute also codified, in

[1] The contract between Vanity Fair and Goldsmith may have created a license for Warhol's works as derivative works, and they would then be owned independently by the licensee. There are many issues with this theory which were not addressed below. We decline to address this argument sua sponte, and we leave it to future litigation. See Eugene Volokh, *What's Wrong and What's Missing in the SG's Amicus Brief in Andy Warhol Foundation v. Goldsmith*, REASON MAGAZINE, Sept. 6, 2022, https://reason.com/volokh/2022/09/06/whats-wrong-and-whats-missing-in-the-sgs-amicus-brief-in-andy-warhol-foundation-v-goldsmith/.

Section 107, a long-recognized fair use defense to copyright claims; that section of the act includes an illustrative preamble and a nonexclusive four-factor test.

> The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> > (1) the *purpose and character* of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> >
> > (2) the *nature* of the copyrighted work;
> >
> > (3) the *amount and substantiality* of the portion used in relation to the copyrighted work as a whole; and
> >
> > (4) the *effect of the use* upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (emphasis added).

The question in this case is limited to the first factor. On its face, the term "purpose" is broad, but the statute's text includes two sets of examples that illustrate the level of generality that courts must use when defining a purpose as well as the types of purposes Congress saw as fair. *Id.* § 107(1).

First, the preamble to § 107 provides examples that clarify what type of "purposes" should be considered fair. The preamble identifies "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. While this list is not exhaustive, each of the six purposes in the preamble shows the type of generalized and easily discernable purpose that is the focus of this inquiry. Congress did not define any of these purposes with specificity toward the subject matter being

criticized, researched, or taught. Thus, the statute anticipates a high level of generality, and the purpose of a work should be framed generally. Additionally, these purposes provide good examples of which purposes are fair purposes. None of these purposes involve copying for advertising or for pure monetary gain. Thus, these examples show how to frame a purpose and which purposes support a fair use claim.

Second, § 107(1) includes a clause that further demonstrates the level of generality required when defining a purpose. The second clause of § 107(1) notes that the purpose inquiry includes "whether such use is of a *commercial* nature or is for *nonprofit educational* purposes" 17 U.S.C. § 107(1)(emphasis added). These examples are also phrased in general terms that a court could easily identify behind a use. There is a danger in over-classifying purposes as commercial given that every purpose could be considered commercial at some level, but the statute speaks only generally when identifying the many purposes that are primarily commercial. Furthermore, this part of the statute implies that those purely commercial purposes are not as supportive for fair use claims as nonprofit educational purposes. Thus, each of these examples demonstrates the type of general purpose evaluated under § 107(1) as well as some of the purposes that a court should consider fair.

B

Our precedent has built off this statutory framework by establishing methods of proving that a purpose is fair under § 107(1). One way to show that a purpose is fair is to show that the new work is transformative. While the word

"transformative" does not appear in the text of the statute, we have identified the term's usefulness in identifying how the statute applies. *Campbell*, 510 U.S. at 579. If the follow-on use of a work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," then the work may be sufficiently transformative to establish that the use had a fair purpose under § 107(1). *Id*. Thus, our precedent has established a way to show a work is transformative by looking at the message or meaning, but this analysis must still be tethered to the statutory inquiry into "purpose." 17 U.S.C. § 107.

In two recent cases, *Campbell* and *Google*, we identified uses that had a fair purpose because they were transformative. *Campbell,* 510 U.S. 569 (1994); *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021). In *Campbell*, we dealt with parodies. Ray Orbison originally created a song, and he later alleged that 2 Live Crew's follow-on work bore too much of a resemblance to his original work to be fair use. *Campbell*, 510 U.S. at 573 (1994). He further alleged that the purpose of both works was to make music for profit, and this purpose frustrated fair use. Despite the merits of this allegation, we looked to the satirical message and meaning of the work which showed that 2 Live Crew's song was transformative when compared to the original. *Id*. at 594. Thus, the follow-on work had a satirical purpose behind it, and satire, like criticism, is a fair purpose. *Id*. In making this finding, we undertook a limited message-or-meaning analysis to determine whether the work was transformative in order to better inform the purpose inquiry. *Id*. at 579. With parodies, that analysis is important because parodies necessarily use some of the

original work to critique the original. *Id*. We concluded that the 2 Live Crew parody was transformative because the drastic shift in meaning showed a "further purpose," and that purpose can support a fair use claim. *Id*.

Nonetheless, *Campbell* does not establish that any articulable shift in message or meaning automatically makes the purpose of the use fair. Instead, in *Campbell,* we focused on clear and complete shifts in message that changed the work from a love song to the complete opposite–a parody of a love song. This is the level of transformation we have recognized as proof of a fair purpose. Additionally, we did not analyze or identify with any specificity the message or meaning of 2 Live Crew's work. We identified that the purpose was parodic and ended the analysis. Our limited inquiry into message and meaning in *Campbell* illustrates how courts can use a follow-on work's meanings to discern the use's purpose and ultimately determine whether the "use made of [the] work . . . is a fair use." 17 U.S.C. § 107.

In *Google*, we dealt with the copying of significant amounts of code to create a new tool for Android phones. We applied the *Campbell* analysis to determine whether the copier's use "adds something new, with a further purpose or different character, altering" the copyrighted work "with new expression, meaning or message." *Google*, 141 S.Ct. at 1202. Looking at the whole of the new work, we concluded that the increase in the use and usefulness of the tool was sufficient to show that the work was transformative, and the purpose was therefore fair under § 107(1).

Reading the statute and our precedent together, a court must ultimately look for a fair purpose like criticism or nonprofit education, but the court can examine the message or meaning of a follow-on work to help determine whether the work was sufficiently transformative to show this fair purpose. Thus, the analysis considers more than the visual appearance of the copying, and elements like message, meaning, or eventual use can indicate a transformation which shows a fair purpose. Any further inquiry, however, must remain tethered to the central inquiry of purpose. For example, the transformative inquiry in *Campbell* investigated the meaning of the new work but only as a means of discovering its purpose. In *Google* we looked to the usefulness of the tool created but only to determine whether the copying had a fair purpose. Thus, the question of whether a work is transformative relies on factors like message and meaning, and the answer can help determine whether the purpose was fair under § 107(1).

III

In this case, the question is limited to whether an analysis under § 107(1) supports a finding that Orange Prince is a fair use. This case requires us to navigate a tension between a creator's right to license follow-on works and the rights of follow-on artists to create something new by building on the works of others.

A

Before looking at any factors, we must specify the *use* at issue. Each factor in the fair use analysis must be applied to "the use made of a work in any particular

case." 17 U.S.C. § 107. AWF contends that the *use* was Andy Warhol's creation of the Prince Series. On the other hand, Goldsmith contends that AWF's *use* of the photograph includes the sale to Condé Nast Magazine. In this case, this issue comes up because there is extended time between Warhol's creation and the potential copyright violation.

The definition of the use must be holistic. Looking back to the statutory test for fair use in § 107, many of the factors would not work unless the you include the ultimate use of the work. The test, in § 107(1) and § 107(4), asks whether the use is "commercial," and what effect the use had on the market. Attempting to analyze the fair use of the works at the point of creation would force us to ignore these factors. Additionally, the holistic approach is consistent with the broad view of the use in *Google* in which we analyzed the copying as "one small part of the considerably greater whole," and we found that the whole use was transformative. *Google*, 41 S.Ct. at 1205. Thus, both the statute and precedent encourage a holistic view of the use. This also means that a single work may have multiple uses, and only some of which might qualify for fair use protections.

Here, a holistic view of the use includes both the creation of Orange Prince and the 2016 sale to Condé Nast. This case concerns the use of a work that began with an artist's creation, but the original owner passed the follow-on work to another owner who chose to use that artwork for a commercial use. All of this is a part of the use of Goldsmith's photo. This does not mean the Prince Series is always linked to AWF's commercial use. Rather, Warhol's and AWF's use of Goldsmith's

photo has many potential uses depending on how the owner chooses to use the work (e.g., displayed in a museum or sold as an art piece). Therefore, in this "particular case," the use must include AWF's licensing of the work to a magazine. 17 U.S.C. § 107.

B

Because the "use" includes both the creation of Orange Prince and its use in the magazine, we must analyze both to determine if the use was "fair." 17 U.S.C. § 107. To aid in this analysis we consider the message or meaning of the work but only as a means of discovering the purpose of the use. Ultimately the goal is to discern whether the purpose of AWF's use of the photograph served a purpose like "criticism, comment, news reporting, teaching . . . scholarship, or research." *Id*. If we cannot find of one of these purposes, or another "fair" purpose, then Goldsmith prevails on the first factor of the fair use analysis.

The purpose of Warhol and AWF's use of Goldsmith's photograph in Orange Prince was not fair. Warhol created the work on a contract for Vanity Fair with the anticipation that the work would be used as an illustration in a widely distributed magazine. Likewise, AWF had the same purpose when they licensed the work to Condé Nast. Together, Warhol and AWF have taken Goldsmith's photograph, modified it, and licensed it to a magazine. At a broad level this is a commercial purpose, but even more specifically the purpose of the use of Goldsmith's photo was to provide imagery to accompany a magazine article. Notably, this is the same purpose that Goldsmith had when she took the original picture, but Goldsmith was

not copying another artist. AWF's commercial purpose was not fair, and Second Circuit correctly gave weight to Goldsmith on this factor.

AWF argues that the application of the message or meaning test from *Campbell* reveals a novel communicative purpose that is fair, but this reading ignores the distinctions between this case and *Campbell*. Unlike, the parody song in *Campbell*, Orange Prince does not possess a clear satirical message. Instead, the alleged message is about the dehumanizing effects of fame, and while it is distinct from the alleged message in the Goldsmith photograph, the distinction does not demonstrate a total transformation like the message shift in *Campbell*. Accordingly, this different message does not make the follow-on work transformative, and AWF has not shown a fair purpose. Furthermore, the message in Orange Prince does not link to any of the exemplary purposes in the preamble to the statute. In *Campbell,* the new message was clearly indicative of fair purpose because it was a form of critique and criticism. Thus, the message behind Orange Prince does not make it transformative, and the purpose was not one recognized as a ground to justify copying under § 107(1). AWF can point to a nuanced distinction, but absent a truly transformative shift in the meaning of the work, the fair use analysis gives no weight to this nuance.

D

Judges cannot decide fair use cases based on these subtle distinctions in message or meaning because they are ill equipped to make nuanced determinations about the purpose of art. The facts of *Campbell* show how a court is fully equipped

to determine message when the meaning or message is so distinct as to give the work a clear purpose (i.e., criticism). This, however, is where the judge's discernment of artistic meaning should end. Our precedent has respected this institutional limitation on judges ever since the early cases on copyright protections. See *Bleistein*, 188 U.S. at 249. Additionally, while Warhol's fame and iconic messages make it easy to determine the nuanced messages in this case, this is likely the exception rather than the rule. In the inevitable onslaught of cases that would follow an alternative ruling, judges will not be dealing with the difference in meaning between a Warhol and a simple photograph. Instead, judges may deal with new art and artists who claim they have different messages than the original. That question cannot be answered consistently by judges across the system, and thus it should not be their duty. To say that this case is different because the artist is Andy Warhol, and *a Warhol* inherently conveys a different message, is to recognize what the Second Circuit termed a "celebrity-plagiarist privilege" or exception to the requirements of fair use. *Warhol*,11 F.4th at 31 (2nd Cir. 2021). The statute does not provide such an exception, judges are not equipped to play the role of critics, and thus the fair use analysis cannot hinge on our modern awareness of Warhol's brilliance.

One amicus notes that judges may make these decisions about a message or meaning without passing a subjective judgement on the "competency or value of the work." *Brief for Richard Meyer as Amicus Curiae*, p. 3. The problem, however, with a dispositive focus on message or meaning is not that judges are incompetent in

making value judgments. The problem is that judges are ill equipped to consistently gauge the magnitude of differences between messages and meanings from case to case, and thus decisions on transformative works would become arbitrary. The proposed method does not solve this problem. By placing judges in this position, a test focused on finding a different message or meaning would force courts to begin an unending line drawing exercise to determine which alleged meanings and messages can be reasonably perceived. Today, we avoid that result by limiting the message distinctions to cases where judges can clearly identify a transformative shift in meaning.

IV

A

The parties also dispute a potential necessity requirement in the fair use analysis. Goldsmith contends that a follow-on artist must show that they needed to use the original work to justify their use of the work as fair. Goldsmith relies on *Campbell*, in which we noted that a parody is fair use in part because it "needs" to replicate or mimic the original. *Campbell*, 510 U.S. at 580–81. Goldsmith further explains that necessity should be a required element in the fair use analysis because a necessity requirement ensures that the use does not "supersede" or replace the original. *Id* at 579. AWF, on the other hand, contends that necessity is not a part of the doctrine, and it would place too much of a burden on artists whose work requires the use of another work.

Neither party is correct. Necessity is another means of determining whether a purpose was fair. Like the other phrases that do not appear in the text of the statute (message, transformative, etc.) the "necessity" of a use can be evidence to show that the use had a fair purpose under § 107(1). *Campbell* is an example of a measured use of the necessity requirement. Because it was necessary for 2 Live Crew to copy and mimic parts of the song to achieve their parodic purpose, the necessity of the use shows that the use was fair. Compare this with a critic who reprints an entire short story in a review. Because the inclusion of an entire work would not be necessary, analysis of the necessity of the use shows that this use may not be fair.

Additionally, we have steered away from bright line rules in questions of fair use, and we decline to adopt one here regarding necessity. While the *Campbell* opinion uses the term "need" on multiple occasions, it is important to remember that *Campbell* is dealing with a unique class of works–parodies. In parodies, this use of necessity could be useful. It does not follow that necessity is a requirement in all fair use cases.

AWF is also wrong to assert that a necessity analysis would destroy the creative spirit that fair use protects. AWF contends that no follow-on artist could prove that the specific original work was necessary to their follow-on work because there are always multiple potential targets (pictures of Prince, popular songs, etc.) that they could use to make their point. Necessity, however, need not mean absolutely necessary, and a necessity requirement does not demand a categorical

exclusion of works like Orange Prince because Warhol could still pick the target of the ridicule even when different targets would suffice. This softer version of necessity reflects the Court's long and storied history with the word "necessary" in which we have concluded that absent a qualifying adjective like "absolutely," the word necessary does not mean essential. See *McCulloch v. Maryland*, 17 U.S. 316 (1819). Therefore, if an inquiry into necessity could help a court determine the fairness of the use's purpose, then the court should use it.

B

AWF is also concerned that our definition of the "use" as including the sale to the magazine double-counts the fourth factor of the analysis, and that our ruling stifles creativity in a way "Congress could not have intended." Pet. Reply Br. 15. AWF is correct to note that the first and fourth factors overlap because often a commercial purpose and an effect on a market are proven with the same facts and inferences. These factors, however, are not intended to be weighed completely independently of one another. See *Campbell*, 510 U.S., at 578 ("Nor may the four statutory factors be treated in isolation from one another"). Thus, the overlap is more of a feature rather than a bug. The overlap between commercial purpose in the first factor, and market effects in the fourth factor, is inevitable in this fair use analysis.

Additionally, applying this broader version of the use will not stifle creativity in opposition to the objectives of copyright law. Courts must also apply the test with respect to the "basic purposes" of copyright law. *Twentieth Century Music Corp. v.*

Aiken, 422 U.S. 151, 156 (1975). These purposes provide incentives to create by protecting artists' exclusive rights. Under our ruling, follow-on works that achieve a different purpose, like parody, are still transformative. Works that use the exact original work as a part of a larger work with different and greater usefulness than the original are still transformative. Even works that are not transformative may still be protected under the other § 107 factors. Even when not protected by fair use, there are many genres or follow-on derivative works that still flourish by negotiating for licenses from the original owner. In fact, Warhol himself used to obtain licenses to use photographs in his works, and Vanity Fair negotiated a one-time deal in this case. No party contends that Warhol's creativity was stifled by this requirement. Thus, this ruling still encourages creativity, which is the goal of copyright law. If the artist still feels stifled, the artist can still seek out the original subject, but Warhol, like any other artist, "is not free to copy the copy." *Bleistein*, 188 U.S. at 249.

* * *

The issue presented is limited to the first factor of the fair use analysis, and our holding is accordingly limited to the first factor. We hold that the Second Circuit adequately weighed the message and meaning of Orange Prince and rightly concluded that it did not give the work an independent purpose. Thus, no points go "on the board" for AWF after that part of the analysis, and AWF did not challenge any other aspect of the fair use analysis in this Court. Accordingly, we AFFIRM the

ruling of the court of appeals with respect to the analysis of Section 107(1), and we remand for further proceedings consistent with this opinion.

Applicant Details

First Name	**David**
Middle Initial	**M**
Last Name	**Stewart**
Citizenship Status	**U. S. Citizen**
Email Address	**dave.stewartii.law@gmail.com**
Address	**Address** Street **2995 Chapel Ave West** City **cherry Hill** State/Territory **New Jersey** Zip **08002** Country **United States**
Contact Phone Number	**5702698341**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**May 2019**
JD/LLB From	**Seton Hall University School of Law** **https://law.shu.edu**
Date of JD/LLB	**May 26, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Seton Hall Legislative Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Eugene Gressman**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Solomon, Justice Lee A.
lee.solomon@njcourts.gov
856-317-7199

Hartnett, Edward
edward.hartnett@shu.edu
973-642-8869

Coenen, Michael
michael.coenen@shu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

David M. Stewart

2995 Chapel Avenue West, Apt 5M · Cherry Hill, NJ 08002 · 570-269-8341 · Dave.StewartIII.Law@gmail.com

The Honorable Michael Brennan
United States Court of Appeals, Seventh Circuit
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, Wisconsin 53202

Dear Judge Brennan:

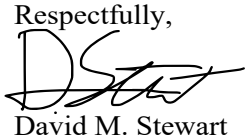
I write to apply for a clerkship for the first term in which you have availability. I want to clerk for the United States Court of Appeals, Seventh Circuit because I want to serve the judiciary and grow as a lawyer. I have enjoyed my state court clerkship and learned more than I ever thought possible. I want to clerk again because I want the same experience in federal court. A clerkship in your chambers would give me the opportunity to learn and serve while getting to live in a different part of the country.

I am currently clerking for Justice Lee A. Solomon of the New Jersey Supreme Court. My experience would make me an asset to your chambers. Because we are a court of discretionary appeal, part of my job is to review petitions for certification to determine whether a case is worthy of the court's attention. That review involves researching the law and reviewing the lower courts' decisions to provide Justice Solomon with a recommendation. I also help the court prepare for oral argument—once an appeal has been granted, I write bench memoranda for the entire court and conference with Justice Solomon about the case. Finally, I help Justice Solomon write opinions. I view the role of a law clerk as being part of a judge's team—my job is to make your job easier and help avoid reversal.

The skills that I am developing will translate to your chambers. By the time I would join you, I would bring with me an appellate clerkship's worth of experience with New Jersey's highest court. Moreover, after my clerkship ends, I will be joining Riker Danzig, LLP, one of New Jersey's oldest law firms. At Riker, I will serve clients and gain practical experience working under former Assistant United States Attorneys and other federal court litigators.

Enclosed, please find my resume, transcript, and writing sample for your review. Justice Solomon has kindly agreed to send a letter of recommendation, which should arrive in the coming days. My "Federal Courts" professor, Edward A. Hartnett has agreed to do the same. I welcome the opportunity to discuss my qualifications at your convenience, either via web-conferencing software or in person—I would jump at the opportunity to visit Milwaukee. Thank you for considering my candidacy.

Respectfully,



David M. Stewart

David M. Stewart

2995 Chapel Avenue West, Apt 5M · Cherry Hill, NJ 08002 · 570-269-8341 · Dave.StewartIII.Law@gmail.com

EDUCATION

Seton Hall University School of Law, Newark, NJ
Juris Doctor, *magna cum laude*; May 2022
GPA: 4.01/4.33
Rank: 6/163 (Top 4%)
Honors: Order of the Coif; Eugene Gressman Moot Court Competition Champion, Winner of Best Brief and Best Oral Advocate Awards; Chancellor's Scholar (merit-based); Leadership Fellow
Journal: Seton Hall Legislative Journal, Senior Articles Editor, Vol. 46; Member, Vol. 45 (authored *None Quiet on the Michigan Front: The Constitution & Michigan's War on Tesla*)
Clinics: FINRA Investor Advocacy Project (Fall 2021 – May 2022); District of New Jersey Settlement Conference Practicum (Fall 2021); S.D.N.Y. Representation in Mediation Practicum (Spring 2021)
Activity: Treasurer, Federalist Society (April 2021 – May 2022); McLaughlin Trial Advocacy Workshop (Spring 2022); Senator, Student Bar Association (September 2020 – May 2021)

The Pennsylvania State University, State College, PA
Bachelor of Arts in Economics, Minor in Philosophy; May 2019
GPA: 3.76/4.00
Honors: Dean's List (5 semesters); "President's Distinguished Freshman" award recipient; World Language Department "Excellence in Latin" award recipient; Altoona Honors Program
Activities: Sophomore Class President (August 2016 – May 2017); Penn State Altoona Rugby (January 2016 – May 2017)

EXPERIENCE

Riker Danzig LLP, Morristown, NJ
Litigation Associate, Starting September 2023

The Honorable Lee A. Solomon, Supreme Court of New Jersey, Trenton, NJ
Judicial Law Clerk, August 2022 – August 2023
- Review petitions for certification, briefs, and appellate record to recommend that the Court grant or deny certification
- Draft and edit judicial opinions
- Write bench memoranda for the full Court in preparation for oral argument
- Conference with Justice Solomon and co-clerks to discuss cases

Mandelbaum Barrett P.C. (*formerly Mandelbaum Salsburg P.C.*), Roseland, NJ
Summer Law Clerk, May 2021 – November 2021
- Researched state and federal law to assist attorneys in forum selection, brief writing, and identifying causes of action
- Drafted discovery responses, memoranda, and deposition questions
- Assisted "White Collar and Criminal Defense" Co-Chair in presenting a CLE on national security and terrorist screening
- Assisted with trial preparation by gathering exhibits, researching legal questions, and discussing strategy

The Honorable Walter F. Timpone, Supreme Court of New Jersey, Trenton, NJ
Judicial Intern, May 2020 – September 2020
- Reviewed petitions for certification to assist law clerks in recommending whether the Court grant or deny certification

Seton Hall University School of Law, Newark, NJ
Research Assistant to Professor Michael B. Coenen, September 2021 – May 2022
- Assisted in proofreading and drafting Professor Coenen's now-published treatise: "Principles of Constitutional Structure"

Research Assistant to Professors John Jacobi and Tara Ragone, May 2020 – August 2020
- Surveyed "community health worker" funding practices across the United States for potential adoption in New Jersey

PROFESSIONAL AFFILIATIONS

- **Association of the Federal Bar of New Jersey**, Member
- **John C. Lifland American Inn of Court**, Associate
- **Federalist Society, New Jersey Lawyers Chapter**, Executive Board Member

INTERESTS

Penn State football, hiking, rugby, craft beer, chess, Brazilian Jiu-Jitsu, and the E Street Band

NAME David M Stewart
XXXXX2934

SCHOOL OF LAW
(973) 642-8502
Seton Hall University
ONE NEWARK CENTER, NEWARK, NJ 07102-5210

SETON HALL UNIVERSITY • SETON HALL UNIVERSITY • SETON HALL UNIVERSITY

Off Transcript - Law

Course Level: Professional
Student Type: Cont-FT Day - Law
Only Admit: Fall 2019

Current Program
Juris Doctor
Program : JD in Law
College : Law School
Campus : Newark
Major : Law

Rank : 6/163

Degree Awarded Juris Doctor 01-JUN-2022
Ehrs: 88.00 GPA-Hrs: 54.00 QPts: 216.31 GPA: 4.01
Primary Degree
Program : JD in Law
College : Law School
Campus : Newark
Major : Law
Inst. Honors: Magna Cum Laude
Order of the Coif

SUBJ NO. COURSE TITLE CRED GRD PTS R

INSTITUTION CREDIT:

Fall 2019
FT Day - Law

LAW 5050	Intro Lawyering I-Lgl Rs Wrtg	2.00	B-	5.34
LAW 6001	Civil Procedure I	3.00	A	12.00
LAW 6005	Contracts	5.00	A-	18.35
LAW 6008	Torts I	4.00	A	16.00

Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 51.69 GPA: 3.69

Spring 2020
*Pass/D/Fail grading adopted in connection with COVID-19
Cont-FT Day - Law

HIPH 7504	Professional Responsibility	2.00	P	0.00
LAW 5051	Intro Lawyering II-Lgl Rs Wrtg	2.00	P	0.00
LAW 5052	Intro to Lawyering-Interact Sk	2.00	P	0.00
LAW 6002	Civil Procedure II	2.00	P	0.00
LAW 6014	Criminal Law	3.00	P	0.00
LAW 6016	Property	5.00	P	0.00

********** CONTINUED ON NEXT COLUMN **********

Ehrs: 16.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

Summer 2020
Cont-FT Day - Law

CORP 7125	Financial Concepts for Lawyers	1.00	P	0.00
EXTN 9161	Judicial Externship	2.00	CR	0.00
PRMD 8210	Persuasion and Advocacy	2.00	P	0.00

Ehrs: 5.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

Fall 2020
Cont-FT Day - Law

CORP 7131	Business Associations	4.00	A	16.00
JRNL 7142	Legislative Bureau Member	1.00	CR	0.00 I
LAW 6015	Constitutional Law	5.00	A+	21.65
PRMD 8200	Leadership-Ethics-Dec Making	1.00	CR	0.00 I
TAXN 7112	Federal Income Taxation	3.00	A	12.00

Ehrs: 14.00 GPA-Hrs: 12.00 QPts: 49.65 GPA: 4.14

Spring 2021
Cont-FT Day - Law

HIPH 7501	Jurisprudence	2.00	A	8.00
JRNL 7142	Legislative Bureau Member	1.00	CR	0.00 I
MTCT 7151	Appellate Advocacy	2.00	A	8.00
PRMD 7201	Evidence	3.00	A+	12.99
PRMD 8200	Leadership-Ethics-Dec Making	1.00	CR	0.00 I
PRMD 9235	SDNY Rep Mediation Practicum	2.00	P	0.00
PUBR 7908	The First Amendment	3.00	A	12.00

Ehrs: 14.00 GPA-Hrs: 10.00 QPts: 40.99 GPA: 4.10

Fall 2021
Cont-FT Day - Law

COML 7125	Secured Transactions	3.00	A	12.00
CRJU 7401	Crim Pro-Inv-Arr and Counsel	4.00	A	16.00
JRNL 7143	Legislative Bureau Editor	1.00	CR	0.00
PRMD 8220	Investor Advocacy Project	2.00	A	8.00 I
PRMD 8221	Investor Advocacy Project	0.00	NG	0.00 I
PRMD 9238	DNJ Settlement Conf Practicum	2.00	HP	0.00

Ehrs: 12.00 GPA-Hrs: 9.00 QPts: 36.00 GPA: 4.00

********** CONTINUED ON PAGE 2 **********

+ PARTIAL RECORD
++ INCLUDES STATISTICS FROM MANUAL RECORD
* COURSE NOT APPLICABLE TO PROGRAM

JoAnn Maldonado
OFFICIAL SIGNATURE

All official transcripts must bear the signature of the Registrar and the Seal of the University

OF

06-13-2022

SETON HALL UNIVERSITY • SETON HALL UNIVERSITY • SETON HALL UNIVERSITY

THE NAME OF THE UNIVERSITY IS PRINTED IN BLUE ACROSS THE FACE OF THIS 8 1/2 X 11 DOCUMENT

NAME David M Stewart
XXXXX2934

SCHOOL OF LAW
(973) 642-8502
Seton Hall University
ONE NEWARK CENTER, NEWARK, NJ 07102-5210

COURSE NUMBER	COURSE TITLE	GRADE	CREDIT HOURS	QUALITY POINTS	COURSE NUMBER	COURSE TITLE	GRADE	CREDIT HOURS	QUALITY POINTS

Off Transcript - Law

Spring 2022
Cont-FT Day - Law

MTCT 7152	Eugene Gressman App Mt Ct Comp	1.00	CR	0.00
PRMD 7203	Federal Courts	3.00	A+	12.99
PRMD 8220	Investor Advocacy Project	2.00	A	8.00 I
PRMD 8221	Investor Advocacy Project	1.00	A	4.00 I
PRMD 8260	McLaughlin Adv Trial Ad Wkshp	3.00	CR	0.00
PUBG 7801	Administrative Law	3.00	A+	12.99

Ehrs: 13.00 GPA-Hrs: 9.00 QPts: 37.98 GPA: 4.22

IN PROGRESS WORK

JRNL 7145	Legislative Bureau Editor	2.00	IN PROGRESS

In Progress Credits 2.00

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	88.00	54.00	216.31	4.01
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	88.00	54.00	216.31	4.01

********** END OF TRANSCRIPT **********

+ PARTIAL RECORD
++ INCLUDES STATISTICS FROM MANUAL RECORD
* COURSE NOT APPLICABLE TO PROGRAM

JoAnn McDonald
OFFICIAL SIGNATURE

All official transcripts must bear the signature of the Registrar and the Seal of the University

OF

06-13-2022

SETON HALL UNIVERSITY • SETON HALL UNIVERSITY • SETON HALL UNIVERSITY

SETON HALL UNIVERSITY • SETON HALL UNIVERSITY • SETON HALL UNIVERSITY

THE NAME OF THE UNIVERSITY IS PRINTED IN BLUE ACROSS THE FACE OF THIS 8 1/2 X 11 DOCUMENT

Undergraduate Advising Transcript

Name: **David Stewart**
Student ID: **918472233**

Print Date: 04/17/2020
Campus ID: DFS5215

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 05/04/2019
Plan: Economics (BA)
Plan: Philosophy (UMNR)

Requestor: David Stewart

Beginning of Undergraduate Record

FA 2015

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
ECON	102	Microec Anly	3.000	3.000	A	12.000
ENGL	15	Rhetoric and Comp	3.000	3.000	A	12.000
LATIN	1	Elementary Latin	4.000	4.000	A	16.000
MATH	34	Math of Money	3.000	3.000	A	12.000
PHIL	108	Intro Soc Pol Phil	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.000	16.000	16.000	64.000
Transfer Term GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined GPA	4.000	Comb Totals	25.000	25.000	16.000	64.000
Cum GPA	4.000	Cum Totals	16.000	16.000	16.000	64.000
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	4.000	Comb Totals	25.000	25.000	16.000	64.000

Term Honor: Dean's List

SP 2016

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
ECON	104H	Macroec Anly	3.000	3.000	A	12.000
Course Attributes:		Honors				
GEOG	10	Intro Phys Geog	3.000	3.000	A	12.000
LATIN	2	Elementary Latin	4.000	4.000	A	16.000
PHIL	103	Intro Ethics	3.000	3.000	A	12.000
STAT	100	Stat Concepts	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.000	16.000	16.000	64.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	16.000	16.000	16.000	64.000
Cum GPA	4.000	Cum Totals	32.000	32.000	32.000	128.000
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	4.000	Comb Totals	41.000	41.000	32.000	128.000

Term Honor: Dean's List

Undergraduate Advising Transcript

Name: **David Stewart**
Student ID: **918472233**

FA 2016

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
BIOL	110	Biology Conc Biod	4.000	4.000	A-	14.680
COMM	150	Cinema Art	3.000	3.000	A	12.000
COMM	292	Intro Med Pol	3.000	3.000	A	12.000
Course Attributes:		Honors				
LATIN	3	Intermediate Latin	4.000	4.000	A	16.000
PHIL	200	Ancient Phil	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.920	Term Totals	17.000	17.000	17.000	66.680
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.920	Comb Totals	17.000	17.000	17.000	66.680
Cum GPA	3.970	Cum Totals	49.000	49.000	49.000	194.680
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.970	Comb Totals	58.000	58.000	49.000	194.680

Term Honor: Dean's List

SP 2017

Program: Liberal Arts
Plan: Economics (BA) Major
Plan: Philosophy (UMNR) Minor

Course		Description	Attempted	Earned	Grade	Points
ASTRO	1	Astro Universe	3.000	3.000	A	12.000
CAS	100A	Effective Speech	3.000	3.000	A	12.000
Course Attributes:		Honors				
ECON	497	Special Topics	3.000	3.000	A	12.000
Course Topic:		Environmental Economics Policy				
GEOG	123	Geog Dvlpg World	3.000	3.000	A	12.000
MUSIC	54	Bgn Cl Gtr/Nonmus	1.000	1.000	A	4.000
PHIL	496	Indep Studies	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.000	16.000	16.000	64.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	16.000	16.000	16.000	64.000
Cum GPA	3.980	Cum Totals	65.000	65.000	65.000	258.680
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.980	Comb Totals	74.000	74.000	65.000	258.680

Term Honor: Dean's List

FA 2017

Program: Liberal Arts
Plan: Economics (BA) Major
Plan: Philosophy (UMNR) Minor

Course		Description	Attempted	Earned	Grade	Points
AFAM	126	Hip-Hop	3.000	3.000	A	12.000
CAMS	33	Roman Civ	3.000	3.000	A-	11.010
ECON	106	Stat Fdns Economet	3.000	3.000	B	9.000
ECON	302	Inmd Microec Anly	3.000	3.000	C+	6.990
PHIL	202	Modern Phil	3.000	3.000	A-	11.010

Undergraduate Advising Transcript

Name: **David Stewart**
Student ID: **918472233**

			Attempted	Earned	GPA Units	Points
Term GPA	3.330	Term Totals	15.000	15.000	15.000	50.010
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.330	Comb Totals	15.000	15.000	15.000	50.010
Cum GPA	3.860	Cum Totals	80.000	80.000	80.000	308.690
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.860	Comb Totals	89.000	89.000	80.000	308.690

SP 2018

Program: Liberal Arts
Plan: Economics (BA) Major
Plan: Philosophy (UMNR) Minor

Course		Description	Attempted	Earned	Grade	Points
ECON	304	Inmd Macroec Anly	3.000	3.000	B-	8.010
ECON	306	Intro Econometrics	3.000	3.000	B	9.000
ENGL	202A	Writing/Soc Sci	3.000	3.000	A-	11.010
PHIL	479	Critical Theory	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.340	Term Totals	12.000	12.000	12.000	40.020
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.340	Comb Totals	12.000	12.000	12.000	40.020
Cum GPA	3.790	Cum Totals	92.000	92.000	92.000	348.710
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.790	Comb Totals	101.000	101.000	92.000	348.710

FA 2018

Program: Liberal Arts
Plan: Economics (BA) Major
Plan: Philosophy (UMNR) Minor

Course		Description	Attempted	Earned	Grade	Points
ECON	323	Public Finance	3.000	3.000	A-	11.010
ECON	412	Labor Econ and Mkts	3.000	3.000	A	12.000
ECON	443	Econ of Law and Reg	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.890	Term Totals	9.000	9.000	9.000	35.010
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.890	Comb Totals	9.000	9.000	9.000	35.010
Cum GPA	3.800	Cum Totals	101.000	101.000	101.000	383.720
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.800	Comb Totals	110.000	110.000	101.000	383.720

Term Honor: Dean's List

SP 2019

Program: Liberal Arts
Plan: Economics (BA) Major
Plan: Philosophy (UMNR) Minor

Undergraduate Advising Transcript

Name: **David Stewart**
Student ID: **918472233**

Course		Description	Attempted	Earned	Grade	Points
ECON	296	Indep Studies	1.500	1.500	A	6.000
Course Topic:		Macroecon Analysis				
ECON	333	International Econ	3.000	3.000	B-	8.010
ECON	444	Corporate Econ	3.000	3.000	A-	11.010
KINES	81	Wellness Theory	3.000	3.000	A-	11.010

			Attempted	Earned	GPA Units	Points
Term GPA	3.430	Term Totals	10.500	10.500	10.500	36.030
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.430	Comb Totals	10.500	10.500	10.500	36.030
Cum GPA	3.760	Cum Totals	111.500	111.500	111.500	419.750
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.760	Comb Totals	120.500	120.500	111.500	419.750
Undergraduate Career Totals						
Cum GPA:	3.760	Cum Totals	111.500	111.500	111.500	419.750
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.760	Comb Totals	120.500	120.500	111.500	419.750

Test Credits

Advanced Placement		Conversion		0.00
Transferred to Term FA 2015 as				
PLSC	1	Intr to Am Nat Gov	3.000	TR
Advanced Placement		Conversion		0.00
Transferred to Term FA 2015 as				
HIST	20	Amer Civ to 1877	3.000	TR
Advanced Placement		Conversion		0.00
Transferred to Term FA 2015 as				
HIST	21	Amer Civ From 1877	3.000	TR

End of Undergraduate Advising Transcript

SCHOOL OF LAW
Seton Hall University
One Newark Center, Newark, New Jersey 07102-5210

Edward A. Hartnett
Richard J. Hughes Professor
for Constitutional and Public Law and Service
Edward.Hartnett@shu.edu
973-642-8842

February 13, 2023

Re: Clerkship Application of David Stewart

Dear Judge:

David Stewart has applied to serve as your law clerk. I strongly urge you to hire him.

David was a student in my Federal Courts class in the spring of 2022. Federal Courts is a demanding course that attracts many of the strongest students at Seton Hall. In that competitive environment, David earned an A+ on an anonymously-graded exam—the only student to achieve that grade.

I was not surprised to learn that David was the top student on the exam, because he was also the top student in the classroom. He was well prepared for class, participated significantly in class discussion, and made connections to other classes, especially administrative law. His contributions were well-considered and insightful.

I require students not only to read many pages of the Hart & Wechsler text, but also to post written reflections on the assigned reading each week. David's reflections, like his comments in the classroom, demonstrated his serious engagement with the material. They ranged from the classic *Marbury* model of adjudication (where the power to announce the law is a byproduct of its duty to decide the case) to the scant need for the *Rooker-Feldman* doctrine (given the law of preclusion). In between, he posted significant reflections on the retroactivity of judicial decisions, the Anti-Injunction Act, qualified immunity, and the Eleventh Amendment.

Notably, David was not afraid to voice what some might view as unpopular opinions. In doing so, he was never arrogant or disrespectful. Whether in the classroom or in after class discussions, David has been thoughtful, considerate, respectful, engaged, and insightful.

As you can tell from his transcript, I am far from alone in recognizing David's intelligence and hard work. Rather than slack off in his final semester of law school, he not only earned an A+ in Federal Courts, but did the same thing in his Administrative Law class. He also won both best brief and best oral advocate in the school's moot court competition.

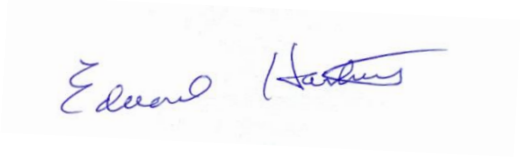
I can confirm based on my experience teaching at NYU, Penn, and Virginia that the strongest students at Seton Hall can run with students from top schools.

David's accomplishments are especially noteworthy when one recalls that his law school class was the one hit by COVID in the spring of the first year of law school. That class had to shift overnight to remote learning for the rest of their first year and spent their second year in a hybrid format with rotating groups of students required to attend remotely to allow for sufficient social distancing in the classroom.

David has the intellect, experience, work ethic, and personality to be a great law clerk. And he will be an even better law clerk after he completes his first clerkship, serving as a law clerk to Justice Lee Solomon of the New Jersey Supreme Court.

If you have any questions, please let me know.

Sincerely,



Edward A. Hartnett

David M. Stewart

2995 Chapel Avenue West, Apt 5M · Cherry Hill, NJ 08002 · 570-269-8341 · Dave.StewartIII.Law@gmail.com

In connection with my clerkship application, I attach a bench memorandum that I wrote for the Court. The Court has asked that I include the following boilerplate disclaimer:

> "I drafted the memorandum that follows during my 2022-2023 clerkship for Justice Solomon. An effort has been made to redact all confidential information, and all names, dates, locations, and other identifiers in the text that follows are fictional. Nevertheless, please treat this as a confidential document for use only in connection with my pending application."

[redacted]

Prepared for the Court
By Dave Stewart
[redacted]

BENCH MEMORANDUM

Stagecoach Motors Corp v. Jennings et al.
[A-XX-XX] [XXXXX]

[The decision under review is unpublished: Stagecoach Motor Corp. v. Jennings et al., No. A-XXXX-XX (App. Div. 2022)

Legend

Plaintiff-Appellant Appendix	**(Pa)**
Plaintiff-Appellant Appellate Brief	**(P_App.Div.)**
Plaintiff-Appellant Petition for Certification	**(P_Cert.)**
Plaintiff-Appellant Reply Brief	**(P_Reply)**
Defendant-Respondent Appellate Brief	**(R_App.Div.)**
Defendant-Respondent Opposition to Certification	**(R_Opp.)**

Attachments

- **REDACTED**

I. Introduction

This action arises out of an application for zoning variances before the Luckenbach planning board ("Board").

In 2017, Highwayman, LLC applied for zoning variances to develop a restaurant in Luckenbach, New Jersey. Stagecoach Motors Corp. owned neighboring property. Highwayman appeared at planning board meetings to support its application and was represented by John J. Jennings, an attorney employed by Williams, Robbins, Van Zandt & Coe P.C. Stagecoach also attended these meetings with counsel to oppose Highwayman's application.

On May 24, 2018, the Board held its ninth meeting to discuss the Highwayman application. At this meeting, the Board's attorney announced that Jennings had called him about a potential conflict of interest. The attorney stated that Jennings's law firm had previously done some estate planning work for one of the Board members, Joseph Cash and that Jennings was designated as having an alternate power of attorney under Cash's will. Jennings confirmed the Board's attorney and stated that all documents were prepared by a former law partner who was no longer with the firm; Jennings himself had not prepared anything. The Board's attorney asked for the "the lawyers" to look at this Court's decision in Wysokowski v. Rizas, 132 N.J. 509 (1993) and determine if there was a conflict of interest.

Cash did not recuse himself. At the August 23, 2018, meeting, the Board held public comment and approved Highwayman's application. In October of 2018, Stagecoach filed an action in lieu of prerogative writs, hoping to set aside the Board's decision. Stagecoach named the Board and Highwayman as defendants. Stagecoach alleged, among other things, that there was an impermissible conflict of interest between Jennings and Cash. Judge Kris A. Kristofferson, who presided over the action in lieu of prerogative writs, agreed and remanded the matter to the Board for reconsideration with a replacement for Cash, if his absence would prevent a quorum.

In October of 2020, Stagecoach filed an amended complaint as part of a civil action, seeking damages and other relief against Jennings, his law firm, and John/Jane Does employed by the firm ("Defendants") in connection with the Board hearings and the action in lieu of prerogative writs. Defendants successfully moved to dismiss for failure to state a claim, but Stagecoach was permitted to amend it. When Stagecoach filed a second amended complaint, it too was dismissed for failure to state a claim. In the order dismissing the complaint, the judge opined that Stagecoach's action was barred by the entire controversy doctrine.

Stagecoach appealed to the Appellate Division, which affirmed. This Court granted certification on October 4, 2022.

II. Facts & Procedural History

A. Facts

1. Luckenbach Planning Board

This appeal concerns the dismissal of Stagecoach Motors Corp.'s ("Appellant" or "Stagecoach") complaint for failure to state a claim upon which relief can be granted. The posture of this case calls for the Court to consider only the facts as alleged by Stagecoach, however, I submit a complete factual narrative below based on the record. I append Stagecoach's complaint.

In early 2017, Highwayman LLC sought to open a restaurant at 51 Bank Street in Luckenbach. (Pa 14a ¶4). This parcel was not zoned for a restaurant, so Highwayman applied to the Luckenbach Planning Board ("Board") for zoning variances. (Pa 14a ¶4). Stagecoach owned neighboring property at 55 Bank Street. (Pa 2a ¶5). Stagecoach objected to Highwayman building a restaurant. (Pa 2a ¶5).

The Board held ten meetings on ten different days between May 25, 2017, and June 28, 2018, to discuss Highwayman's application. (Pa14a ¶6). John Jennings,[1] an attorney, represented Highwayman before the planning

[1] REDACTED

board. (Pa 14a ¶7). Jennings worked at Lindabury, McCormick, Estabrook & Cooper P.C., a law firm. (Pa 13a ¶2). Joseph Cash sat on the Board. (Pa 14a ¶8). On May 24, 2018, during the ninth Board meeting, John Strait, the Board's attorney, announced:

> After the last meeting[,] I received a call sometime thereafter from [Highwayman's] attorney, Mr. Jennings, who advised of the potential for a conflict. It appears that some time ago, around 2014, Mr. Jennings's firm had done some estate planning work for a Board Member, Joe Cash. And in connection with that there was a general durable power of attorney with respect to life planning matters, financial health, whatever, in which Mr. Jennings was appointed as an alternate or successor power of attorney, you know, potentially with the ability to carry out Mr. Cash's personal matters.[2]
>
> And so there [are] a couple of issues I think that arise from that. One is -- and by the way, I should say that Mr. Jennings made that call. I spoke with Ms. Suarez yesterday, which was the first that she heard of the issue. And she asked, reasonably, that she be given the opportunity to weigh in and bring that issue to the Board before proceeding any further with the hearings, which I recommend that she be given an opportunity to do that, as well as Mr. Jennings.
>
> So there are two issues that arise from that fact pattern.
>
> . . . .

[2] Stagecoach's second amended complaint also alleges that "[a]t the outset of Jennings's representation of Highwayman before the Board, he knew of his long-standing personal relationship with Board member Joseph Cash, which relationship began at least as early as 2003." (Pa 14a ¶8).

> Mr. Jennings will either confirm that fact pattern or say otherwise, but those are the facts that seem most relevant to me based on what I heard. I think there are two issues that arise from that. Number one is; is there conflict for Mr. Cash to sit on the Planning Board and preside over this application? That to me is issue number one. And issue number two is; if Mr. Cash does have a conflict, what effect or what impact does that have on the proceedings? Those are the two legal issues that I feel need to be addressed.
>
> [(Pa 112a-113a)]

The Board then discussed the procedure for handling this type of issue: the parties would prepare written submissions regarding the conflict and then the Board would privately deliberate. (Pa 113a-114a). The Board would then open the floor to public comment and allow the parties to make closing statements. (Pa 114a; 116a).

After this discussion, Jennings responded to Strait:

> Mr. Strait, thank you for that eloquent analysis. Just also for the record, I did not draft any of those documents. Those documents were drafted by my former partner, who is no longer with our law firm. I don't know if that is a factor or not, but I want that fact disclosed. Certainly, I called you, as I said to you last month, when I learned of all of this, and immediately called you, because I talked to my partners and asked whether I had an ethical obligation to disclose it. They felt I should, and I did call you. Certainly[,] a less than ethical person may have thought about not disclosing it. But certainly I felt under the circumstances, as an officer of the court[,] I felt I had to. Certainly, I feel very strongly there is no conflict. I don't think it should effect the proceedings . . . .

[(Pa 114a-115a)]

Strait then explained:

> I think that the lawyers should look at the Wysokowski decision, the Supreme Court decision, which will really -- which codifies the Local Government Ethics Law and the factors that give rise to the conflict. There are four basic prongs, and there should be some analysis under the facts presented here as it relates to those prongs to determine, A, whether there is a conflict in your opinion; and B, I know there are cases out there that do discuss what the impacts are of conflicts in which Board Members, you know, sit for some or all of the hearing and what the impacts are on the case. Cases are fact specific, so it would help me certainly, and I think the Board, if there was some analysis in that regard. And the Board will consider that and act accordingly.
>
> [(Pa 115a-116a)]

The application then adjourned for the day. (Pa 117a). On August 23, 2018, the Board approved Highwayman's application. (Pa 16a ¶19). Cash had not recused himself. (Pa 15a ¶16).

2. Action in Lieu of Prerogative Writs

On October 8, 2018, Stagecoach filed an action in lieu of prerogative writs, challenging the Board's decision to grant Highwayman's application. (Pa 64a-90a). Among other things,[3] Stagecoach challenged the decision on the

[3] The other allegations in the prerogative writs action are irrelevant for this appeal. But, for the sake of completeness, I list all allegations below: (1) defective public notice; (2) use variance required; (3) conflict of interest between Cash and Jennings (discussed in text); (4) conflict of Board member

grounds that Jennings's relationship with Cash created an impermissible conflict of interest. (Pa 73a-75a). Stagecoach demanded judgment against the Board and Highwayman seeking: (1) reversal of the Board's decision; (2) a declaration that Highwayman's application for site plan approval and variances is denied; (3) attorney's fees and costs of suit; and (4) any other relief as may be just and equitable. (Pa 75a).

Rather than engage in discovery, the parties stipulated to certain facts concerning the nature of Cash's relationship with Jennings. (Pa 16a ¶23; Pa 98a). On October 25, 2019, the Honorable Kris Kristofferson, A.J.S.C., ordered that the matter be remanded for consideration anew by the Board. (Pa 91a). In his written decision, Judge Kristofferson found that, under the Wyzykowski test,[4] Cash had an "indirect personal conflict of interest that should have disqualified him from voting on the Resolution." (Pa 103a). Judge Kristofferson concluded that "under the statutory provision that

---

Nelson; (5) improper participation of Nelson and members of the Board; (6) failure to accept a real estate expert on adverse effect on adjacent properties and neighborhood; (7) failure to allow restaurant expert to testify; (8) use of cellphones and internet during hearings is improper and a violation of OPMA; (9) considering MPA evidence without supporting testimony and right of cross-examination; (10) denial of due process; (11) parking variance should not be granted; (12) approval was arbitrary, capricious, and unreasonable; (13) bias and prejudice; (14) cumulative error; and (15) other defects and errors. (Pa 64a-90a)

[4] Wyzykowski v. Rizas, 132 N.J. 509 (1993).

prohibits a planning board member from voting 'on any matter in which he has, either directly or indirectly, any personal or financial interest,'" Cash had a conflict of interest under N.J.S.A. 40:55D-23(b). (Pa 103a). Thus, the Board was ordered to reconsider the application "with a replacement for Cash, if his absence would prevent a quorum." (Pa 105a). The court rejected Stagecoach's other arguments. (Pa 105a-109a). On January 8, 2020, Stagecoach filed a motion for taxed costs incurred in connection with the action; Judge Kristofferson denied that motion. (Pa 40a).

B. Procedural History

1. Initial & First Amended Complaint

On May 26, 2020, Stagecoach filed its initial complaint, suing Jennings, his firm, and John/Jane Does 1-10 ("Defendants"),[5] seeking "damages, including, but not limited to, excess attorney's fees during the hearings and before the Board, and for the legal services necessitated by the Action in Lieu of Prerogative Writs, which was successful." (Pa 3a). Stagecoach filed its first amended complaint on October 7, 2020, alleging three causes of action: (1) professional negligence; (2) breach of fiduciary duty; and (3) vicarious

[5] The complaint explains that John/Jane Does 1-10 are fictitious, standing in the place of "other persons, whether or not attorneys, who either individually or as partners of, or employees of, [Williams, Robbins, Van Zandt & Coe P.C.]who rendered legal services in connection with the matters set forth" in the complaint. (Pa 8a).

liability. (Pa 7a-12a). In response, Defendants[6] moved to dismiss the first amended complaint for failure to state a claim upon which relief can be granted under Rule 4:6-2(e). (Pa 22a).

Following oral argument, the judge granted Defendants' motion and dismissed Stagecoach's first amended complaint without prejudice, allowing Stagecoach to file an amended complaint within fourteen days. (Pa 23a).

2. Second Amended Complaint & Motion to Dismiss

Stagecoach timely filed its second amended complaint, which reiterated its original three causes of action and added a cause of action for "intentional misrepresentation/equitable fraud." (Pa 17a-18a).

Defendants again moved to dismiss under Rule 4:6-2(e) and the court granted the motion, dismissing the complaint with prejudice. (Pa 31a). The court noted that the second amended complaint was "substantially the same" as the first amended complaint but with an additional cause of action for "intentional misrepresentation/equitable fraud" and some additional facts about Jennings's relationship with Cash. (Pa 36a). Despite the additional facts, the court dismissed the overlapping claims from the first amended complaint for the same reasons outlined in its initial statement of reasons and

[6] Jennings, his firm, and the John/Jane Does are represented by the same attorney and rely on the same papers. The firm and the John/Jane Does are alleged to be vicariously liable for Jennings's actions.

expressly incorporated that document into its order. (Pa 36a). I briefly summarize each point below:

a. Professional Liability

The court equated "professional liability" with legal malpractice. (Pa 26a). The court explained that a legal malpractice claim requires an attorney-client relationship, which Stagecoach did not allege. (Pa 26a). The court found this omission fatal to this claim. (Pa 26a). The court likewise rejected Stagecoach's attempt to distinguish "professional liability" from legal malpractice. (Pa 27a). The court explained that Stagecoach's complaint did not: (1) allege any misrepresentation by Jennings or (2) cite any case law "remotely similar" to the facts at bar. (Pa 27a-29a). Likewise, the court reasoned that permitting a cause of action on these facts could "impinge" on an attorney's ability to zealously represent clients. Finally, the court explained that "there is no apparent harm" to Stagecoach because Judge Kristofferson remanded to the Board for reconsideration without Cash and "[Stagecoach was] free to seek any resulting damages and costs in that [a]ction." (Pa 29a).

b. Breach of Fiduciary Duty

The court next disposed of Stagecoach's breach of fiduciary duty claim. (Pa 30a). Because Stagecoach and Defendants were adversaries before the Board, and Stagecoach was represented by its own counsel, the court

concluded that Stagecoach failed to establish a fiduciary relationship or reliance on Defendants in any professional capacity. (Pa 30a).

c. Vicarious Liability

Because the court dismissed Stagecoach's underlying claims against Jennings, it also dismissed Stagecoach's claims of vicarious liability. (Pa 30a).

d. Entire Controversy Doctrine

Although the court dismissed Stagecoach's complaint for failure to state a claim, it also opined that Stagecoach's claims were barred by the entire controversy doctrine. (Pa 30a). The court explained that "Plaintiff appears to be seeking the same damages that he sought within the complaint filed in the [original action]," and thus the entire controversy doctrine likely barred relief. (Pa 30a). On the court's reading, Stagecoach's claims should have been asserted in the action in lieu of prerogative writs. (Pa 39a). Because they weren't, they were barred by the entire controversy doctrine. (PA 39a). The court also explained that following the order remanding to the planning board, Stagecoach moved for taxed costs in connection with that action. (Pa 40a).

e. Intentional Misrepresentation/Equitable Fraud

The court rejected Stagecoach's new claim for "intentional misrepresentation/equitable fraud." (Pa 37a). The court explained that fraud

claims are subject to a heightened pleading standard under R. 4:5-8 and that Stagecoach has "not clearly pled with specificity any intentional acts or omissions by Defendants." (Pa 37a). Rather, as the court noted, Stagecoach acknowledged that Jennings disclosed his potential conflict to the Board. (Pa 37a). The court disposed of Stagecoach's claim for equitable fraud because it sought only damages, not equitable relief; damages are not available in an equitable fraud action. (Pa 38a).

3. Appellate Division

Stagecoach appealed the trial court's decision to the Appellate Division, arguing that: (1) the trial court erred in dismissing the second amended complaint for failure to state a claim; (2) the facts were alleged with specificity to support a cause of action for intentional misrepresentation; (3) the facts were alleged with specificity to support a cause of action for breach of fiduciary duty and vicarious liability; (4) the entire controversy doctrine does not bar this suit; and (5) reversal is warranted because the trial court has "absolved attorneys from disclosing disqualifying conflicts and sanctioned a lack of candor to tribunals." (P_App.Div. i). The Appellate Division rejected each claim as summarized below.

a. Professional Negligence

The Appellate Division explained that legal malpractice requires an attorney-client relationship creating a duty of care or knowledge by the attorney that a non-client will rely on the attorney's representations (and that the non-client not be too remote to deserve protection). Stagecoach Motors Corp. v. Jennings, No. A-1954-20 (slip op. at 11-13) (citing Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213 (App. Div. 2014)). The Appellate Division affirmed dismissal of this clam because Stagecoach had not adequately alleged an attorney-client relationship, reliance, or that it suffered any damages. Id. at 15.

b. Intentional Misrepresentation/Fraud

The Appellate Division explained the elements of common law fraud, namely that: (1) defendant made a representation or omission of a material fact; (2) with knowledge of its falsity; (3) intending that the representation or omission be relied upon; (4) which resulted in reasonable reliance; and (5) that plaintiff suffered damages. Id. at 16. The court also noted that equitable fraud does not require proving scienter. Id. at 16. The Appellate Division found that Stagecoach did not specify what Jennings concealed or omitted, and that Stagecoach's general allegations were insufficient to state a claim. Id. at 16.

c. Breach of Fiduciary Duty

The Appellate Division likewise rejected Stagecoach's argument that Jennings "owed to the participants, including the parties and the public at large," a fiduciary duty to immediately disclose his relationship with Cash at the outset of the proceedings. Id. at 17. The Appellate Division noted that where, as here, the parties' relationship is "essentially adversarial," courts will ordinarily presume that a transaction is conducted at arm's length and refuse to find a fiduciary relationship. Id. at 18.

Here, the Appellate Division observed that because Stagecoach was represented by its own counsel, Jennings was not "under a duty to act for or give advice for the benefit of [Stagecoach]." Id. at 18-19 (quoting F.G v. MacDonell, 150 N.J. 550, 563 (1997)). Further, the Appellate Division rejected Stagecoach's argument that Jennings owed a fiduciary duty to the public at large because a fiduciary duty is a unique, heightened relationship of trust and intimacy. Id. at 19.

d. Vicarious Liability

The Appellate Division noted that Stagecoach "fail[ed] to include any argument or case law relative to the vicarious liability issue" and thus waived the issue. Ibid. Nonetheless, the Appellate Division briefly noted that because

none of the claims could stand as against Jennings, there could be no basis for vicarious liability. Ibid.

e. Entire Controversy Doctrine

The Appellate Division next rejected Stagecoach's arguments concerning the entire controversy doctrine, reasoning that there is no bright-line rule preventing interrelated claims from being adjudicated together in an action in lieu of prerogative writs. Id. at 22. Rather, to determine whether the entire controversy doctrine bars a subsequent action, a court must consider "whether the facts adduced in the first action," such as a prerogative writs action, "would be adduced in the second action and whether the claims in the second action were necessary to the determination of the first action." Id. at 22 (quoting Joel v. Morrocco, 147 N.J. 546, 548 (1997)). Under this framework, the Appellate Division found a sufficient transactional nexus between the action lieu of prerogative writs and the action under review: "[t]he nexus includes the same parties, the same set of facts, the same record, and the same underlying issue--whether defendants disclosure sufficed to establish a conflict of interest with Cash that warranted his recusal or Jennings's." Ibid.

f. Attorney Ethics

Finally, the Appellate Division rejected Stagecoach's claim that Jennings violated the Rules of Professional Conduct. Id. at 23. The Appellate Division agreed that a lawyer may not knowingly "make a false statement of fact or law to a tribunal" or "fail to correct a false statement of material fact or law previously made to the tribunal," but concluded that Jennings did neither. Ibid. Indeed, the Appellate Division concluded that Jennings did not knowingly make any "false statement of material fact or law" and was unaware of the conflict prior to his own volunteering of the information. Id. at 24.

The Appellate Division concluded by noting that any arguments not expressly addressed in the opinion were without sufficient merit to warrant discussion in a written opinion. Id. at 24.

This Court granted certification on October 4, 2022. Jennings died on November 222, 2022.

III. Parties' Arguments

A. Plaintiff-Appellant: Stagecoach Motors Corp.

1. The Appellate Division Sanctioned Attorney Misconduct Under RPC 3.3 and Applicable Precedent.

Stagecoach argues that the Appellate Division "ignored the statements made by Jennings, the definition of tribunal, and the public policy implications

of the issue at the heart of this matter." (P_Cert. 7). Stagecoach contends that Jennings violated RPC 3.3(a)(1)[7] by not disclosing his relationship with Cash at the outset of the Board proceedings and, when "invited to expound upon the potential conflict," making an incomplete disclosure. (P_Cert. 7; P_App.Div. 30). According to Stagecoach, under RPC 1.0(n),[8] the Board is a tribunal, and the Appellate Division erred in concluding otherwise. (P_Cert. 8).

Stagecoach cites to other mandatory disclosure requirements, including a bar applicant's obligation to disclose "previous transgressions" and a practicing attorney's obligation to disclose authority adverse to his client. (P_Cert. 8-9).[9]

Stagecoach also argues that the Appellate Division assumed facts not in the record: the complaint alleged that Jennings knew of a conflict at the start of the proceedings, but the Appellate Division found that Jennings learned of the conflict much later. (P_Cert. 7-8). According to Stagecoach, the Appellate Division could only make that determination -- contrary to the complaint -- by

[7] "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." RPC 3.3(a)(1).
[8] A tribunal is "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency, or other body acting in an adjudicative capacity." RPC 1.0(n).
[9] I note that between its petition for certification and Appellate Division brief, Stagecoach cites one case and only for the proposition that attorneys are "held to a higher standard." (P_Cert. 9-10).

considering Jennings's testimony. (P_Cert. 7-8). Because Jennings did not testify, Stagecoach argues that the Appellate Division assumed Jennings's lack of knowledge without a basis in the record. (P_Cert. 8).

2. The Entire Controversy Doctrine Does Not Apply to this Matter.

Stagecoach argues that the Appellate Division ignored this Court's decision in Olds v. Donnelly, 150 N.J. 424, 442 (1997), which exempted all attorney-malpractice actions from the entire controversy doctrine. (P_Cert. 11). Stagecoach asserts that New Jersey courts have "strained" Olds to create "multiple" exceptions to its originally categorical rule. (P_Cert. 12).

Stagecoach cites to case law to explain that the entire controversy doctrine is only to be applied when it is fair to the litigants and promotes "the doctrine's objectives of conclusive determinations, party fairness, and judicial economy and efficiency." (P_App.Div. 25) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 119 (2019)). Stagecoach argues that applying the doctrine here would do neither. (P_App.Div. 27).

Stagecoach argues that it would be unfair to apply the entire controversy doctrine here because it could not have litigated its claims for damages against Defendants in a prior proceeding. (P_App.Div. 27). According to Stagecoach,

the "underlying action" in this case was the planning board hearing, where it could not have asserted a claim for damages. (P_Cert. 11). Alternatively, Stagecoach argues that even if the action in lieu of prerogative writs is deemed the underlying action, it could not have asserted claims for damages there. (P_Cert. 11). Stagecoach also differentiates the present action from any previous action on the grounds that it seeks different relief, against different parties, presents different legal questions, in a different forum, and on different facts. (P_App.Div. 29-30).

3. The Procedural Dismissal of the Complaint Ignored the Facts as Pled.

Stagecoach argues that it sufficiently pled a cause of action, such that its complaint should have survived Defendants' R. 4:6-2(e) motion. (P_Cert. 13). Stagecoach contends that its Second Amended Complaint ("SAC") adequately alleges facts that, if proven in discovery, set forth "multiple recognized causes of action, specifically for professional negligence and intentional misrepresentation," as well as for vicarious liability against Jennings's law firm. (P_Cert. 14; 19-20).

According to Stagecoach, the SAC provides: (1) that Jennings made a misrepresentation "of omission"; (2) the date of that misrepresentation; (3) where Jennings made the misrepresentation; and (4) the findings from the

action in lieu of prerogative writ setting forth the conflict between Jennings and Cash. (P_Cert. 14). Stagecoach further explains that the SAC alleged that it relied upon Jennings to be candid toward the tribunal "from the outset" and that it suffered damages because of this reliance. (P_Cert. 14).

a. Professional Negligence

First, Stagecoach argues that it pled a sufficient cause of action for professional negligence. (P_App.Div.11). Stagecoach argues that the Appellate Division erred in dismissing the complaint without determining whether Jennings owed Stagecoach a duty. (P_Cert. 15). According to Stagecoach, the Appellate Division simply found that this claim failed for want of an attorney-client relationship and lack of damages. (P_Cert.15).

Stagecoach argues that it was owed a duty even absent an attorney-client relationship. (P_App.Div. 11). According to Stagecoach, under Petrillo v. Bachenburg and Banco Popular N. Am. v. Gandi, a lawyer may owe duties to third parties "who foreseeably rely on the lawyer's opinion or other legal services" or are reasonably induced (by the lawyer) to rely on the lawyer's representations. (P_Cert. 14) (citing Petrillo, 139 N.J. 472, 485 (1995)); (P_App.Div.13) (citing Banco, 184 N.J. 161, 180 (2005)). Stagecoach also argues that, under Petrillo, a court must balance an attorney's duties to clients

under RPC 1.3 with the duty to not mislead foreseeable third parties under RPC 4.1. (P_App.Div.13); (P_Cert. 15).

Against this legal backdrop, Stagecoach argues that the Board transcripts show that Jennings invited Stagecoach to rely by "affirmatively putting into the record that he did not draft any estate documents" and that Stagecoach's having to "endure[] approximately ten (10) hearing dates" establishes reliance. (P_App.Div.14); (P_Cert.16). Stagecoach contends that it had a right to rely on Jennings "upholding his oath . . . and immediately making full disclosure of his relationship with Board Member Cash." (P_Cert. 15).

Stagecoach complains that the Appellate Division did not even consider obligations to third parties because it concluded that Jennings did not invite reliance. (P_Cert. 15). Stagecoach claims that this finding relies on facts that are not alleged in the SAC. (P_Cert.16). Nonetheless, Stagecoach argues that the Court need not decide "whether reliance existed or whether Jennings owed a duty at this preliminary stage" because the Court need only determine "that a cause of action exists." (P_App.Div. 14).

b. Intentional Misrepresentation

Second, Stagecoach argues that the Appellate Division erred in dismissing its claim for intentional misrepresentation. (P_Cert.16). Stagecoach contends that it met the pleading standard for this cause of action

under R. 4:5-8(a), which requires a party to allege "particulars of the wrong, with dates and items if necessary" while allowing "[m]alice, intent, knowledge, and other condition of mind of a person" to be alleged generally. (P_Cert.16).

Stagecoach argues that paragraphs 8-12 of the complaint met this standard:

> 8. At the outset of Jennings's representation of HV before the Board, he knew of his long-standing personal relationship with Board member Joseph Cash, which relationship began at least as early as 2003.
> 9. In 2003, Jennings was designated the alternate executor under Cash's Will. Jennings was also a witness to Cash's 2003 Will. The Will was prepared by Jennings's law firm.
> 10. In 2014, Jennings's law firm again prepared Estate planning documents for Cash. In the 2014 estate planning documents, Jennings was designated as the Executor and successor Trustee under Cash's 2014 Will, and as the successor attorney-in-fact under the 2014 Power of Attorney. Jennings also notarized Cash's 2014 estate documents, and Jennings's wife and son were witnesses. In fact, Cash signed these Estate planning documents at Jennings's personal residence.
> 11. At the May 24, 2018 Board meeting, the ninth meeting and after eight days of hearings, Jennings first brought up the fact that he had a long-standing personal relationship with Cash and that his Firm had previously provided estate planning services for Board member Joseph Cash ("Cash").
> 12. At the May 24th hearing, Jennings did not give a full and fair explanation of his long-standing personal relationship with Cash. [14a-15a.]
>
> [(P_Cert.18)].

Stagecoach contends that it set forth "every element" of the cause of action and "specifically provid[ed]" the exact moment of Jennings's misrepresentation and specified exactly what Jennings "concealed or omitted." (P_App.Div.22); (P_Cert.18). Stagecoach contends that the Appellate Division did not afford the complaint all the inferences to which it was entitled under R. 4:6-2(e) and that the Appellate Division actually contradicted the SAC. (P_Cert. 18).

Stagecoach also takes issue with the Appellate Division's focus on Cash's failure to recuse himself because, according to Stagecoach, once Cash failed to disclose the conflict, it was incumbent upon Jennings to do so. (P_Cert.18). Further, Stagecoach claims that it has already obtained redress against Cash and the Board through its action in lieu of prerogative writs. (P_Cert. 18).

c. Breach of Fiduciary Duty

Next, Stagecoach asserts that it set forth a claim for breach of fiduciary duty, which is different from a claim of legal malpractice. (P_Cert.18). Stagecoach claims that the Appellate Division failed to follow Albright v. Burns, 206 N.J. Super. 625, 633 (App. Div. 1986), where the Appellate Division held that "a member of the bar owes a fiduciary duty to persons, though not strictly clients, who he knows or should know rely on him in his

professional capacity." (P_Cert. 19). Stagecoach claims that Jennings owed a fiduciary duty to disclose the "true nature" of his relationship with Cash but did not do so. (P_App.Div.24). On the contrary, Stagecoach claims that Jennings "affirmatively misled" the Board by not disclosing the relationship. (P_App.Div.24). This, according to Stagecoach, induced the reliance necessary for this claim to proceed. (P_App.Div.24).

Regardless, Stagecoach submits that its complaint did not need to establish a fiduciary relationship or show reliance; it needed only to allege facts that support a cause of action, which it claims to have done. (P_App.Div.24).

d. Vicarious Liability

Last under this point heading, Stagecoach contends that the Appellate Division "failed to acknowledge" that it (Stagecoach) fully briefed the issue of vicarious liability. (P_Cert.19). Stagecoach contends that its brief fully articulated the legal basis for the claim, but the Appellate Division failed to accept its allegations as true. (P_Cert.20).[10]

[10] I note that Stagecoach's Appellate Division brief contains zero substantive discussion of the vicarious liability claim. The only mention of vicarious liability is in a point heading: "The trial court erred in dismissing the complaint as plaintiff has alleged facts to support a cause of action for breach of fiduciary duty and vicarious liability." (P_App.Div.i) (emphasis added). All discussion above regarding vicarious liability comes from Stagecoach's petition for certification and Appellate Division reply brief.